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DEPARTMENT OF COMMERCE

U. S BUREAU OF CORPORATIONS

TRUST LAWS

AND

UNFAIR COMPETITION

JOSEPH E. DAVIES
Commissioner of Corporations

MARCH 15, 1915

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DEPARTMENT OF COMMERCE
BUREAU OF CORPORATIONS

TRUST LAWS
AND
UNFAIR COMPETITION

BY

AUGUST 11, 1915

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LETTERS OF TRANSMITTAL.

DEPARTMENT OF COMMERCE,
OFFICE OF THE SECRETARY,
Washington, March 15, 1915.

SIR: I transmit herewith a report of the Commissioner of Corporations on Trust Laws and Unfair Competition. This report deals principally with the legislation and judicial decisions of the United States and of the chief foreign countries with respect to industrial combinations and unfair competition.

Very respectfully,

WILLIAM C. REDFIELD, *Secretary.*

The PRESIDENT.

DEPARTMENT OF COMMERCE,
BUREAU OF CORPORATIONS,
Washington, March 15, 1915.

SIR: I have the honor to transmit herewith a report on Trust Laws and Unfair Competition made to the President under your direction, and in accordance with the law creating the Bureau of Corporations. This report deals principally with the legislation and judicial decisions of the United States and of the chief foreign countries with respect to industrial combinations and unfair competition.

I desire to mention as especially contributing, under my direction, to the preparation of this report, Messrs. Francis Walker, Adrien F. Busick, Morten Q. Macdonald, E. O. Merchant, William F. Notz, and Ernest S. Bradford, of this Bureau.

Very respectfully,

JOSEPH E. DAVIES,
Commissioner of Corporations.

To Hon. WILLIAM C. REDFIELD,
Secretary of Commerce.

LETTER OF SUBMITTAL.

DEPARTMENT OF COMMERCE,
BUREAU OF CORPORATIONS,
Washington, March 15, 1915.

SIR: I have the honor to submit herewith a report on Trust Laws and Unfair Competition.

The Bureau first directed its attention to this subject in connection with proposed legislation to supplement the antitrust laws, undertaken by the Sixty-third Congress, in order that it might be able, in so far as desired, to furnish information thereon to the legislative branch of the Government. Furthermore, in connection with the decision of Congress to establish a Federal Trade Commission and to grant to it certain functions regarding unfair methods of competition, the Bureau made a general investigation of the laws regarding such competitive methods. Much information was collected in a form adapted to the purpose in view, and it was thought that it would be useful to the general public. For this reason, therefore, and without presuming to make a dogmatic interpretation of the law, it is deemed advisable to publish this material in the present form.

Among the chief subjects discussed are Federal antitrust legislation, the judicial decisions thereunder, and the influence of such legislation on forms of business organization, the antitrust laws of the several States, the legislation of foreign countries with regard to combinations, and the laws and judicial decisions in the United States and various foreign countries with regard to unfair or unlawful competition.

EFFECT OF LEGISLATION ON BUSINESS ORGANIZATION.

A comparison of the development of antitrust legislation in the United States and its judicial interpretation with the contemporaneous development of the forms of business organization would seem to justify the conclusion that the law has been an important factor in shaping the forms of business organization. For example, while combinations to suppress competition in the form of holding companies were at one time thought by some to be lawful, and at any rate were frequently resorted to, the clear denunciation of this form of monopolistic combination in a decision by the Supreme Court in 1904 substantially put an end to the formation of combinations of

this sort. In 1911 a decision of the Supreme Court condemned a merger of competing corporations which was monopolistic in effect, and since then combinations of this form and character have been seldom attempted.

SCOPE OF THE SHERMAN LAW.

The judicial interpretation of the Sherman Antitrust Law, especially in more recent decisions, indicates (1) that it is adapted to prevent all kinds of contracts or combinations which directly or hurtfully restrain trade or commerce subject to Federal control, or monopolize or attempt to monopolize it, although the means of restraint employed are so various and changing that it would be difficult to define all of them specifically by statute; (2) that the present judicial interpretation of interstate commerce is such as to leave practically no twilight zone which can not be reached either by Federal or State law; (3) that combinations of persons in whatever walks of life in so far as they are engaged in such commerce are within the scope of its provisions, and in particular that combinations of manufacturers engaged in such commerce are comprehended by the law notwithstanding that an early decision of the Supreme Court gave rise to some doubts as to the extent to which manufacturing combinations were contrary to the law.

Although the Sherman Antitrust Law, therefore, is comprehensive in its scope, it is not so clearly established that the judicial decisions afford a basis for determining with exactness the lawfulness or unlawfulness, when taken severally, of many particular devices that have been used collectively to control the market. Almost every decision has been based on a complex set of facts and the use of a number of different devices to restrain trade.

RECENT FEDERAL ANTITRUST LEGISLATION.

The Clayton Act of October 15, 1914, was designed in part to establish more definitely the unlawfulness of some of these devices to lessen competition, especially with respect to (1) price discrimination, (2) exclusive contracts, (3) the holding by one corporation of stock in another corporation, and (4) the employment by different corporations of common directors. This act also modifies in some particulars the provisions of the antitrust acts, especially with regard to labor and agricultural organizations, and changes in certain respects the methods of procedure and the remedies in the enforcement of the antitrust laws. The provisions of this law, however, have not yet been judicially interpreted and are merely set forth in this report together with those of earlier antitrust laws.

STATE ANTITRUST LAWS.

Almost all the 48 States of the Union have passed laws against trusts and combinations; the comparative study of these laws which is made in this report affords a useful basis for determining the most effective system of State legislation. In certain directions the States, prior to the enactment of the Federal Trade Commission Act and the Clayton Act, had gone further than Congress in forbidding specific forms of unfair competition. The broad field of corporation law is one in which the Federal Government has not attempted any general legislation, and the report refers to this subject only incidentally in respect to State legislation. Undoubtedly extensive reforms in State corporation laws are desirable not only to make them more effective in preventing abuses, but also to make them as nearly uniform as possible for the general convenience of the business world.

TRUST LAWS IN FOREIGN COUNTRIES.

In foreign countries the greatest diversity exists with respect to trust legislation. England has no prohibitory legislation, and in the interpretation of the common law the courts appear to favor freedom of contract more than freedom of industry. In the great English colonies, however, where conditions are most nearly like those in the United States, monopolistic combinations are generally forbidden. The laws of Germany allow a freedom of contract even wider than those of England, and generally uphold combinations or cartels even when they are practically monopolistic in character, while in France such combinations are prohibited in so far as they tend to disturb the natural course of prices as determined by free competition. In Austria such combinations are invalid but not prohibited by the criminal law. A similar diversity of law is found in other European countries.

One of the most remarkable features in the policy of certain foreign countries is the enactment of laws which restrict competition in certain industries or even make obligatory the combination of competitors, as, for example, in the potash industry in Germany, the sulphur industry in Italy, and the petroleum industry in Roumania.

FEDERAL TRADE COMMISSION AND UNFAIR COMPETITION.

The act approved September 26, 1914, establishing a Federal Trade Commission gives extensive administrative powers to the commission with respect to corporation activities and the enforcement of the antitrust laws, and also gives it the quasi judicial function of determining questions of unfair methods of competition. The powers of this commission are extended under the Clayton Act to determine questions concerning certain devices to lessen competition,

referred to above, which are unlawful under the said act, in so far as these devices are used by corporations under its jurisdiction.

MEANING OF UNFAIR METHODS OF COMPETITION.

This report shows what practices have generally been regarded as unfair methods of competition by business men, economic writers, and public men in the United States, and also what practices have been characterized as such by the Department of Justice or by the courts in the administration of the antitrust laws. Furthermore, it shows various competitive practices which at common law the courts have termed unfair competition or which they have held could not be justified. These decisions give a much wider scope to the term than has been generally recognized. In presenting this information, however, it is not intended, in this report, to limit or define the term "unfair methods of competition."

UNFAIR COMPETITION IN FOREIGN COUNTRIES.

A broad survey is also made of legislation on the subject of unfair competition in the chief European countries, with some illustrations of the applications of these laws in the jurisprudence of the respective countries. In some countries reliance is chiefly placed on general provisions of the civil codes, while other countries have elaborate special laws prohibiting particular practices. The present tendency is to combine both of these systems. In most foreign countries the basic idea of unfair competition is an act which unjustly injures a competitor, and comparatively little consideration is given to the question of the effects on the general public.

RELATION OF UNFAIR COMPETITION TO MONOPOLISTIC PRACTICES.

In the United States, on the other hand, the application of the term "unfair competition" in legal decisions and in legislation indicates that the effects on the general public are considered. In certain classes of cases, when determining whether a method of competition is unfair or not, the question whether it tends to lessen competition or to bring about a monopoly appears to be of primary importance. It appears that Congress was conscious of this identity between unfair methods of competition and certain practices to lessen competition, and therefore provided that the quasi judicial functions of the Federal Trade Commission concerning unfair methods of competition should apply to those devices to lessen competition which are prohibited under the Clayton Act.

Very respectfully,

JOSEPH E. DAVIES,
Commissioner of Corporations.

The PRESIDENT.

TRUST LAWS AND UNFAIR COMPETITION.

CHAPTER I.

BRIEF HISTORICAL VIEW OF ANTITRUST LEGISLATION.

Section 1. Introductory.

Efforts to obtain monopolistic control of the market have existed to a greater or less extent in almost all periods of civilization. The general existence of legislation against such efforts is itself evidence of this fact. The degree to which monopolistic conditions have arisen from time to time has depended on a great variety of complex economic conditions and also on the general character of the laws regulating property and business. The opposing tendencies of competition and of monopoly, however, have almost always been present.

The recent development of large combinations and monopolies in the United States, as well as in various foreign countries, has been especially striking, because it followed an era in which competition had been strongly developed. This pronounced competitive era was apparently the result of several historical circumstances, among which may be mentioned the development of the factory system of production, the improvement of means of transportation and communication, the development of more liberal laws of commercial intercourse between nations, and the influence of the economic doctrine of free trade and free industry.

In the United States in the early part of the nineteenth century, competition was more limited locally than to-day, and in particular places was apparently often modified to a considerable extent by local understandings among competitors as well as by the natural limitation of competition through the protection afforded by costs of transportation, difficulty of communication, etc. With the improvement in means of transportation and communication, and the development of nation-wide and world-wide competition, the protection afforded to particular concerns by local position or local understandings disappeared to a large extent and gave rise to efforts at combination and control of the market on a larger scale.

The problem of monopoly in the present day, therefore, is not a new one, although the material interests involved in a particular

case may be of much greater magnitude. Legislation for the purpose of destroying monopoly to-day, as in former historical periods, is only one of the factors to be relied on, because as long as the fundamental laws of property and of trade contemplate and favor a system of individual activity and free contract the power of competition will assert itself to a wide extent, even though monopolistic agreements are not prohibited. Furthermore, if the law, while allowing free contract in general, prohibits such kinds of contracts and associations as have the express purpose or tendency to create in a monopolistic control of the market, competition will be stimulated and monopoly generally prevented.

Section 2. English law regarding monopolies and restraint of trade.

MONOPOLIES BY CROWN PATENT.—Under the Tudors the Crown developed the practice of granting patents of monopoly for the general trade of the country for the enrichment of courtiers and capitalists. These grants became particularly numerous and obnoxious in the time of Elizabeth, and in 1601, after Parliamentary protest, many of them were abolished. In 1602 was decided the so-called Case of Monopolies (Darcy *v.* Allen, 11 Coke, 84). The court declared illegal a Crown patent of monopoly for making playing cards as contrary to the common law and to divers acts of Parliament (e. g., 9 Edward III, cap. 1, 2; 25 Edward III, cap. 2). It enumerated the evils of monopoly as tending (1) to increase prices, (2) to deteriorate the quality of commodities, and (3) to reduce artificers to idleness and beggary. Nevertheless, the grants of monopolies by Crown patent continued on an even larger scale in the reign of James I, and this led to the passage of the Antimonopoly Act of 1624 (21 James I, cap. 3). This act abolished many monopolies, but specially sanctioned some of them. Moreover, this law was frequently disregarded thereafter. The Long Parliament in 1640 declared most of the monopolies void, but some continued in existence and others were created during the period of the Restoration. Monopoly by patent of the Crown was finally abolished in 1689. Monopoly by act of Parliament remained lawful, but this power has not been exercised with respect to trade in Great Britain.

ENGROSSING, REGRATING, FORESTALLING, PRICE AGREEMENTS, ETC.—There were various ancient criminal statutes against engrossing, regrating, and forestalling, as for example, 5 and 6 Edward VI, cap. 14 (1552). These laws were repealed by 12 George III, cap. 71 (1772). Briefly, the elements of these offenses at the common law, as defined by Coke and Hawkins, were as follows: Engrossing consisted in the buying up of large quantities of an article for the purpose of selling it at an unreasonable price; regrating included every practice or device by act, conspiracy, or spreading reports for the purpose of enhancing the prices of victuals; forestalling consisted in

buying victuals on the way to market with the purpose of selling them at higher prices. Under the common law such acts remained criminal until the law was amended by 7 and 8 Victoria, cap. 24 (1844). The only relic of these criminal laws, apparently, is the prohibition against attempts to affect prices by spreading false reports or by preventing goods from being brought to market by force or by threats. There were also ancient criminal statutes against conspiracies and agreements to fix prices and the wages and hours of labor, for example, 2 and 3 Edward VI, cap. 15 (1549). These were repealed by 5 George IV, cap. 95 (1824).

AGREEMENTS IN RESTRAINT OF TRADE TENDING TO FIX PRICES OR TO CONTROL THE MARKET.—The ancient common-law rule that agreements tending to fix prices or control the market may be null and void as in restraint of trade appears, however, to be still in force in England, though considerably modified by recent decisions.

Most of the cases on restraint of trade relate to covenants for the sale of a business and the subsequent abstention of the seller from competition with such business, or between an employer and an employee, whereby the latter agrees not to compete in certain ways after the expiration of his time of service, and do not relate to the question of control of the market, price fixing, etc. The early rule for such contracts appears to have been that any contract by which a trader or artisan sold his business and agreed not to engage in his occupation in any part of the kingdom was void, because it tended to make him a public charge and deprived the public of his services. Such consequences made it an unreasonable agreement from the point of view of such person, and also made it contrary to public policy. The buyer was held not to be entitled to any more protection from future competition than was necessary to make the contract an equitable one to him. While the particular rules as to what terms were to be regarded as unreasonable and what terms as against public policy were changed considerably in the course of time with changing economic conditions and opinions, these two judicial principles of the reasonableness of the restrictions imposed with respect to the interests of the parties and of the public policy of such restrictions have continued to be regarded by the courts down to the present time. In the development of the doctrine the question of reasonableness was one that related primarily to the contracting parties, and not to the public. However, any decision as to public policy necessarily involved the reasonableness of the terms of the agreement from the public point of view. Restraint of trade in this form is, however, of only incidental importance with relation to the question of monopolistic agreements.

The cases in English law which relate to monopolistic agreements are not numerous, and, although a price agreement has been declared

void, it is not clear how far such agreements are valid or invalid. A brief statement of the recent cases on this subject is given in Chapter V (pp. 233–238).

The connection between the ideas of monopoly, engrossing, and restraint of trade, as they developed in the English law, was set forth in the opinion of Chief Justice White in the Standard Oil case,[1] as follows:

(*a*) It is certain that at a very remote period the words "contract in restraint of trade" in England came to refer to some voluntary restraint put by contract by an individual on his right to carry on his trade or calling. Originally all such contracts were considered to be illegal, because it was deemed they were injurious to the public as well as to the individuals who made them. In the interest of the freedom of individuals to contract this doctrine was modified so that it was only when a restraint by contract was so general as to be coterminus with the kingdom that it was treated as void. That is to say, if the restraint was partial in its operation and was otherwise reasonable the contract was held to be valid:

(*b*) Monopolies were defined by Lord Coke as follows:

"A monopoly is an institution, or allowance by the King by his grant, commission, or otherwise to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade."

* * * * * * *

The frequent granting of monopolies and the struggle which led to a denial of the power to create them, that is to say, to the establishment that they were incompatible with the English constitution is known to all and need not be reviewed. The evils which led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: (1) The power which the monopoly gave to the one who enjoyed it to fix the price and thereby injure the public; (2) the power which it engendered of enabling a limitation on production; and, (3) the danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale. As monopoly as thus conceived embraced only a consequence arising from an exertion of sovereign power, no express restrictions or prohibitions obtained against the creation by an individual of a monopoly as such. But as it was considered, at least so far as the necessaries of life were concerned, that individuals by the abuse of their right to contract might be able to usurp the power arbitrarily to enhance prices, one of the wrongs arising from monopoly, it came to be that laws were passed relating to offenses such as forestalling, regrating and engrossing by which prohibitions were placed upon the power of individuals to deal under such circumstances and conditions as, according to the conception of the times, created a presumption that the dealings were not simply the honest exertion of one's right to contract for his own benefit unaccompanied by a wrongful motive to injure others, but were the consequence of a contract or course of dealing of such a character as to give rise to the presumption of an intent to injure others through the means, for instance, of a monopolistic increase of prices.

* * * * * * *

As by the statutes providing against engrossing the quantity engrossed was not required to be the whole or a proximate part of the whole of an article, it is clear that there was a wide difference between monopoly and engrossing, etc. But as the principal wrong which it was deemed would result from monopoly, that is, an enhancement of the price, was the same wrong to which it was thought the prohibited engross-

[1] 221 U. S., 51–55.

ment would give rise, it came to pass that monopoly and engrossing were regarded as virtually one and the same thing. In other words, the prohibited act of engrossing because of its inevitable accomplishment of one of the evils deemed to be engendered by monopoly, came to be referred to as being a monopoly or constituting an attempt to monopolize.

* * * * * * *

And by operation of the mental process which led to considering as a monopoly acts which although they did not constitute a monopoly were thought to produce some of its baneful effects, so also because of the impediment or burden to the due course of trade which they produced, such acts came to be referred to as in restraint of trade.

* * * * * * *

Generalizing these considerations, the situation is this: (1) That by the common law monopolies were unlawful because of their restrictions upon individual freedom of contract and their injury to the public. (2) That as to necessaries of life the freedom of the individual to deal was restricted where the nature and character of the dealing was such as to engender the presumption of intent to bring about at least one of the injuries which it was deemed would result from monopoly, that is an undue enhancement of price. (3) That to protect the freedom of contract of the individual not only in his own interest, but principally in the interest of the common weal, a contract of an individual by which he put an unreasonable restraint upon himself as to carrying on his trade or business was void. And that at common law the evils consequent upon engrossing, etc., caused those things to be treated as coming within monopoly and sometimes to be called monopoly and the same considerations caused monopoly because of its operation and effect, to be brought within and spoken of generally as impeding the due course of or being in restraint of trade.

Section 3. Law regarding monopolies and restraint of trade in the United States prior to the Antitrust Act.

COMMON LAW REGARDING RESTRAINT OF TRADE AND MONOPOLY.—The common law in the United States has been interpreted to restrict the right of contract more extensively than in England, particularly in regard to the limitations imposed by public policy.

Prior to 1890 the usual kind of contract in restraint of trade with the purpose of limiting competition and obtaining control of the market, or monopoly, was an agreement regarding production or prices, or a pool. The legal "trust," which was first applied to this purpose about 1880, as well as the method of holding companies, which came into use a few years after, will be considered below. Such agreements or pools took various forms, but generally provided for some system of restricting output, cornering the supply, dividing markets, fixing prices, dividing profits, or establishing a common selling agency. Buying out competitors in a wholesale way was apparently of rare occurrence. Such agreements have almost always been held in restraint of trade and void as against public policy. A large number of the decisions made in the United States under the common law, covering various forms of combination, are briefly discussed in Chapter II of this report. (See p.24.)

The development in the United States of the doctrine of restraint of trade and of monopoly at the common law, particularly with relation to such acts as were contrary to public policy and therefore

void, has been stated by Chief Justice White in the opinion of the Supreme Court in the Standard Oil case:[1]

In this country also the acts from which it was deemed there resulted a part if not all of the injurious consequences ascribed to monopoly, came to be referred to as a monopoly itself. In other words, here as had been the case in England, practical common sense caused attention to be concentrated not upon the theoretically correct name to be given to the condition or acts which gave rise to a harmful result, but to the result itself and to the remedying of the evils which it produced. The statement just made is illustrated by an early statute of the Province of Massachusetts, that is, chap. 31 of the laws of 1778–1779, by which monopoly and forestalling were expressly treated as one and the same thing.

It is also true that while the principles concerning contracts in restraint of trade, that is, voluntary restraint put by a person on his right to pursue his calling, hence only operating subjectively, came generally to be recognized in accordance with the English rule, it came moreover to pass that contracts or acts which it was considered had a monopolistic tendency, especially those which were thought to unduly diminish competition and hence to enhance prices—in other words, to monopolize—came also in a generic sense to be spoken of and treated as they had been in England, as restricting the due course of trade, and therefore as being in restraint of trade. The dread of monopoly as an emanation of governmental power, while it passed at an early date out of mind in this country, as a result of the structure of our Government, did not serve to assuage the fear as to the evil consequences which might arise from the acts of individuals producing or tending to produce the consequences of monopoly. It resulted that treating such acts as we have said as amounting to monopoly, sometimes constitutional restrictions, again legislative enactments or judicial decisions, served to enforce and illustrate the purpose to prevent the occurrence of the evils recognized in the mother country as consequent upon monopoly, by providing against contracts or acts of individuals or combinations of individuals or corporations deemed to be conducive to such results. * * *

It will be found that as modern conditions arose the trend of legislation and judicial decision came more and more to adapt the recognized restrictions to new manifestations of conduct or of dealing which it was thought justified the inference of intent to do the wrongs which it had been the purpose to prevent from the beginning. * * *

Without going into detail and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy. It is equally true to say that the survey of the legislation in this country on this subject from the beginning will show, depending as it did upon the economic conceptions which obtained at the time when the legislation was adopted or judicial decision was rendered, that contracts or acts were at one time deemed to be of such a character as to justify the inference of wrongful intent which were at another period thought not to be of that character. But this again, as we have seen, simply followed the line of development of the law of England.

[1] 221 U. S., 56–59.

TRUSTS.—The fact that agreements for fixing prices, or otherwise attempting to control the market, were generally held invalid at the common law was apparently the cause for the perversion of the legal "trust" to accomplish the same purpose.

The trust was an ancient device by which the legal ownership and management of property could be put in the hands of one person (trustee) while the beneficial interest remained in another person (cestui que trust). This device was largely employed for the benefit of minors or for the management of property in which there were several beneficiaries, or a beneficiary with a limited interest.

The first application of this device for the purpose of forming a combination to control the market is attributed to the Standard Oil Co. Before 1879 this combination had been held together very largely by means of exchanging the stock of the Standard Oil Co. for the stock of other companies, such stock being held in the name of some individual connected with the Standard and for the Standard's benefit.

On April 8, 1879, a trust agreement was made among all the stockholders of the Standard Oil Co. of Ohio whereby the stocks of 30 separate companies named in the agreement were turned over to three trustees to hold temporarily for the benefit of said stockholders. This trust agreement was succeeded by a more elaborate one dated January 2, 1882. This named nine trustees for specified terms, and also provided the means of electing their successors. To these trustees were confided the ownership and management of all the property of the various individuals who as stockholders or partners were associated together in the Standard Oil combination. In respect to some companies, only a part of the stock was owned by such persons. It was provided that the trustees should issue "Standard Oil trust certificates" of a par value of $100 each, such certificates to be issued to each person joining in the agreement in proportion to the value of the interest which he conveyed to the trust. Such certificates were to represent the beneficial interests of the parties to the trust agreement. The distribution of dividends was to be made at the discretion of the trustees to the holders of the trust certificates. It was provided that the trust might continue during the lives of the survivors and survivor of the trustees named in the agreement and for 21 years thereafter, but that it could be terminated under certain conditions at an earlier date, but not before a period of 10 years.

The Standard Oil Trust was organized substantially like the holding company of later date, which is discussed below. It was imitated by several other great monopolistic combinations, namely, the Whiskey Trust, the Cotton Seed Oil Trust, and the Sugar Trust.

The procuring of a monopoly by a "trust" agreement was held by the courts to be contrary to law and against public policy.

The first great trust case was decided in 1890 in People *v.* North River Sugar Refining Co.[1] The North River Sugar Refining Co. was a corporation of the State of New York which had been absorbed by the Sugar Refineries Co., or Sugar Trust, in 1887. About 23 sugar-refining companies were combined in this trust, which thus obtained about 90 per cent of the total production of refined sugar in the United States. The capital stock of the North River Sugar Refining Co. was put in the hands of the board of trustees and the former shareholders received in return the shares of the trust. These trustees chose and controlled the officers of the North River Sugar Refining Co., and for a time they shut down the plant. A suit was instituted by writ of quo warranto to forfeit the charter of the North River Sugar Refining Co. in 1888. The court of appeals held that the defendant had violated and abused its franchises by entering into the combination under the trust deed. (See p. 62.)

The Standard Oil Trust was declared illegal in 1892 as a consequence of similar proceedings begun in Ohio about 1890. This combination was held ultra vires, contrary to public policy, and void. (State *v.* Standard Oil Co.).[2] (See p. 62.)

These decisions made it clear that the trust device for combining competitors to control the market was unlawful.

HOLDING COMPANIES.—The holding company was next tried as a means of obtaining monopolistic control. It is important, therefore, to consider briefly certain features of State corporation laws prior to the Sherman Act.

At the beginning of the nineteenth century there were only a few corporations, mostly in Massachusetts. Such corporations were all organized under special grant of the legislature. The first State to have anything approaching a general incorporation act was New York; a general law for organizing manufacturing corporations was enacted in 1811 which limited the capital stock to $100,000. After that, general incorporation laws were gradually adopted in other States, but States having such laws were in the minority at the middle of the nineteenth century.

Except in a few States, the common law was interpreted in the sense that no corporation could hold the stocks of another corporation, and some States forbade such holdings by statute. (See p. 58.)

For a long time also corporations were not generally authorized to consolidate. In New York, for example, the consolidation of manufacturing corporations was first permitted in 1867, and was confined to those engaged in the same branch of industry. This privilege was extended in 1892.

Regarding the legal possibility of forming corporate consolidations by means of a holding company, Judge Edward B. Whitney, formerly

[1] 121 N. Y., 582. Compare Brown *v.* Pacific Mail S. S. Co., 5 Blatch., 525 (1867), and Hafer *v.* Railway Co. et al., 14 Cin. Wkly. Law Bull., 68 (1885).

[2] 49 Ohio St., 137.

an Assistant Attorney General of the United States, made the following statement:

> In New York, for instance, the first act enabling one industrial to purchase and hold stock of another was passed in 1853, permitting a manufacturing company to purchase mining stock in certain cases. The principle was extended, but in a very restricted form, in 1866 and 1876. It did not become general, or permit the buying stock of a competitor, for sixteen years later still. In New Jersey the movement began in a very small way in 1883. The present statutes, which permit any company to purchase stock of a rival for control, are more recent even than the Sherman Antitrust Law. They were in all probability adopted, although the legislatures did not know it, for the very purpose of circumventing that law. They date in New York from 1892. In New Jersey their development was from 1888 to 1893. Before that the holding corporation, now so familiar, was a rarity.
>
> Thus all the trusts are in part a product of artificial conditions produced by human legislation, while some of the most dangerous, or at least the most unpopular, among them are a product of legislation obtained by their own lawyers and legislative agents, put quietly through under the cover of the antitrust agitation, while the public, led by the newspapers, were looking somewhere else.[1]

It is noteworthy, though perhaps merely a coincidence, that the New Jersey laws permitting such holding companies were passed between 1888 and 1893, while the legal proceedings against the trust form of combination were first begun in New York in 1888.

There seems to be but little doubt that those interested in forming large corporate combinations hoped to obtain a secure legal basis in the holding company, as the pool and trust had both been declared invalid (though not criminal) at the common law.

Section 4. Legislation against combinations prior to the Sherman Antitrust Act.

STATE ANTITRUST LAWS.—The development of great monopolistic combinations attracted much public attention during the eighties, and especially the formation of trusts, such as the Standard Oil Trust and the Sugar Refineries Co.

The fact that these existed in spite of their supposed illegality at the common law made it seem desirable to those who opposed such monopolistic combinations to prohibit them under the criminal law.

Consequently, several States during the later eighties passed so-called antitrust statutes prohibiting trusts and other combinations in restraint of trade or tending to monopoly. Among the States which passed such laws prior to the Sherman Antitrust Act were the following: Maine, 1889; Michigan, 1889; Tennessee, 1889; Texas, 1889; Iowa, May 6, 1890; Kentucky, May 20, 1890.

In this connection it may be noted that several States prior to 1890 had constitutional provisions declaring monopolies or combinations in restraint of trade unlawful. Among them may be noted Arkansas, Georgia, Kentucky, Tennessee, and Texas.

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[1] American Economic Association. Papers and Proceedings of the Seventeenth Annual Meeting (Chicago, 1904), Part II, pp. 3-4.

INTERSTATE COMMERCE ACT OF 1887.—The way for a Federal law against trusts was paved by the Interstate Commerce Act of 1887, which, among other things, provided that rates in interstate commerce should be reasonable and prohibited discrimination and railway pooling in interstate commerce. This law also established a commission to supervise the enforcement of the law and to decide complaints regarding rates and discriminations.

This Federal railway law was itself preceded by laws of a similar character, in several of the States, relating to intrastate commerce.

Section 5. Sherman Antitrust Act of 1890.

Just as several of the States had found it expedient to pass criminal laws against trusts, so the Federal Government was impelled to legislate in a like manner. This seemed especially desirable for the reason that these combinations were generally of such magnitude that their commerce was largely of an interstate character and affected the country as a whole. Moreover, the Federal Government was regarded as more able to successfully combat them, more likely to do so, and by enforcing a general rule more apt to operate with equality than could be expected from the local application of diverse laws in the several States. Another reason for such Federal legislation was the fact that the common law did not apply in the Federal jurisdiction except in certain cases where the Federal courts applied the laws of the States in which the question arose, and without express legislation there was nothing to prevent the formation of such combinations nor any means of enforcing the law by penalties.

Consequently, in 1890 a bill to prohibit such combinations was introduced in Congress by Senator Sherman, and after earnest debate and careful revision the so-called Sherman Antitrust Act was passed on July 2, 1890. The provisions of this law and some of the judicial decisions thereunder are described in detail in Chapter III. Broadly stated, this law prohibited, under severe penalties, every contract or combination in restraint of interstate or foreign commerce, and every monopolization or attempt to monopolize the same, and provided additional remedies, including suit in equity by the Federal Government, to restrain such combinations, and action at law for triple damages by private parties injured thereby. By this law, therefore, acts which at common law were invalid, were made criminal offenses so far as they related to commerce among the States and with foreign nations, while special remedies were established both at law and in equity.

Section 6. Early judicial interpretation (1890–1901).

INEFFECTIVE ENFORCEMENT OF THE LAW.—While both criminal and civil suits to enforce the Antitrust Act were brought almost

immediately after its passage, the results during the first decade of its existence were, on the whole, unsatisfactory. Various factors are alleged to have contributed to this result. Among these are the following: The serious business depression existing from 1893 to 1896; the alleged lack of sympathy on the part of some Attorneys General with the purposes of the law; the decision in the Knight case, (referred to below); and perhaps to some extent the lack of adequate appropriations for the prosecution of such suits. Several criminal cases were brought at the very beginning, and some failed, it is alleged, on account of faulty indictments. One, at least, of the Attorneys General was apparently very much opposed to the enforcement of the law, and several of them showed but slight activity in initiating suits against offenders. This attitude was taken in spite of the existence and contemporary organization of notorious combinations.

In the following sections a few of the leading judicial decisions will be briefly noted, and their apparent effect upon the economic development suggested.

KNIGHT CASE (1895).—The effectiveness of the act received a severe blow from the decision in the Knight case,[1] which was a proceeding in equity against the American Sugar Refining Co. (Sugar Trust), and the first case under this law to be decided by the United States Supreme Court. The court made a distinction between "manufacture" and "commerce," and held that the evidence proved merely a combination of sugar manufacturers, and this did not constitute a violation of the law, inasmuch as "manufacture" was not "commerce" and the law was directed against combinations in interstate or foreign commerce. It has frequently been claimed that this decision was generally understood to mean that the Antitrust Act did not apply to combinations or consolidations of manufacturing establishments.

The decision has also been much criticized, but it is said that the pleadings of the Government were bad, did not specify a combination engaged in interstate commerce, and that the record of the case did not prove that fact. At any rate, the failure of this case against one of the most notorious combinations of the day threw grave doubt on the effectiveness of the law, and tended to discourage efforts to enforce it. At the same time it gave encouragement to further combinations of the same character.

TRANS-MISSOURI FREIGHT ASSOCIATION CASE (1897).—This case was a proceeding in equity against a combination of railroads formed for the purpose of maintaining rates alleged by defendants to be just and reasonable.[2] The Supreme Court held that the combination was unlawful, and that it was immaterial whether the rate agreement in question was reasonable or not.

[1] See p. 74.

[2] See p. 84.

This decision was understood by many to mean that the reasonableness of an agreement would not be considered, if it in any way restricted competition; that is, that even contracts which only incidentally affected competition, or were only "in partial restraint of trade" (and therefore valid under the common law interpretation of "restraint of trade"), were contrary to the Antitrust Act. The effect of this decision was obviously to discourage efforts at combination by such methods.

ADDYSTON PIPE & STEEL CO. CASE (1899).—In this case,[1] which was a proceeding in equity, a combination of pipe manufacturers established for the purpose of dividing the markets and enhancing the prices of cast-iron pipe was declared by the Supreme Court to be contrary to the law. This case, like the railroad case just considered, tended strongly to discourage combinations in the form of a pool.

Section 7. Economic and political results.

RAPID GROWTH OF TRUSTS (1898–1901).—The last two decisions referred to, wherein pools were declared unlawful and the question of the reasonableness of the terms of the agreement were held to be immaterial, apparently greatly discouraged efforts to form combinations by means of pools, while the failure in the Knight case to condemn a consolidation of manufacturing companies tended to encourage the formation of large consolidations of industrial enterprises.

At any rate, there developed between 1898 and 1901 an extraordinary number of large consolidations, and this period is often referred to as that of the "consolidation craze." Among the great consolidations formed during this period may be mentioned the following:

1898.

American Thread Co.
International Paper Co.
United States Envelope Co.
Federal Steel Co.
American Linseed Co.
American Tin Plate Co.
National Biscuit Co.
International Silver Co.

1899.

Amalgamated Copper Co.
American Smelting & Refining Co.
American Hide & Leather Co.
American Woolen Co.
American Felt Co.
American Agricultural Chemical Co.
Royal Baking Powder Co.
American Ice Co.
United Shoe Machinery Co.
United Fruit Co.
American Shipbuilding Co.
American Car & Foundry Co.
National Steel Co.
International Steam Pump Co.
American Steel & Wire Co.
National Tube Co.
American Steel Hoop Co.
American Window Glass Co.
American Writing Paper Co.
Distilling Company of America.
United States Cast Iron Pipe & Foundry Co.
Bordens Condensed Milk Co.
National Enameling & Stamping Co.
Union Bag & Paper Co.
Standard Oil Co. of New Jersey.
American Chicle Co.

[1] See pp. 76, 112, 113.

1900.

American Sheet Steel Co.	American Bridge Co.
Crucible Steel Co. of America.	American Snuff Co.

1901.

United States Steel Corporation.	International Salt Co.
American Can Co.	Eastman Kodak Co.
Consolidated Tobacco Co.	American Locomotive Co.

All the foregoing concerns were apparently combinations of competing enterprises which embraced a considerable part of the total industry of the United States in their respective branches of business. All of these combinations were apparently formed either by combining control of competing concerns through the agency of a holding company, or by the merging of the plants and business of the concerns combined under the direct control of one company.

INDUSTRIAL COMMISSION (1898–1902).—This extraordinary era of consolidation attracted much public attention. A commission, known as the Industrial Commission, was created by Congress in 1898 to investigate various industrial questions, but particularly the growth of large corporations and trusts. Although the commission was assisted by some expert economists, who helped to make the examination of witnesses more effective than it would otherwise have been, the method of conducting the examination prevented the commission from obtaining the best results. Especially there was a lack of sufficient supporting documentary evidence in statements of account, in statistics of prices, and of production, etc., which would have enabled the commission to weigh accurately the testimony given. While the Industrial Commission, therefore, failed to ascertain many important facts regarding these great combinations, nevertheless it served to awaken popular attention to their great size and power and to some of their excesses, especially in relation to stock watering, promotion profits, and unfair competition. The report of the commission recommended as the chief measure of reform greater publicity regarding the operations of corporations and particularly the establishment of some organ of publicity in the Federal Government.

ESTABLISHMENT OF BUREAU OF CORPORATIONS (1903).—In consequence partly of the recommendations of the Industrial Commission, partly of certain recommendations made by Attorney General Knox, and in response to a general demand for a more effective oversight of corporations, the Bureau of Corporations was organized in 1903 under the Department of Commerce and Labor. The duties of the Commissioner of Corporations were described substantially as follows: To investigate the organization and conduct of corporations and combinations, etc., engaged in interstate commerce (except common carriers) in order to give information to the President and to

enable him to make recommendations to Congress. The powers conferred on the Commissioner for such investigations were extensive and included the power to issue subpœnas to compel the attendance of witnesses and the production of books and papers. The reports of the Bureau were to be made to the President, and published according to his directions.

The method of work contemplated in the formation of the Bureau of Corporations was scientific economic research, and the taking of testimony as ordinarily practiced by commissions was, consequently, of secondary importance.

The primary objects of the Bureau of Corporations, therefore, were first, information for the Government for purposes of legislation, and second, the remedial effects of publicity through the publication of the reports of its investigations.

STATE ANTITRUST LEGISLATION.—It should be noted that State antitrust legislation, which antedated Federal legislation on this subject, continued throughout the period thus far considered and also since that time. The majority of the States established antitrust laws, some of which were more stringent than the Federal law. An important feature of the legislation in several States was the prohibition of certain kinds of "unfair competition," particularly local price discrimination. (See Chap. IV.)

Section 8. Northern Securities case (1901–1904) and its political and economic effects.

NORTHERN SECURITIES CASE (1904).—The Northern Securities Co. was a holding company formed in 1901 by dominant stockholders in the Northern Pacific and Great Northern Railways for the purpose of putting in the hands of a single company the voting power of the dominant stockholders in the said railroads. The Government sought to procure a dissolution of the Northern Securities Co. by proceedings in equity as a combination in restraint of interstate commerce.[1] While in the final opinion of the Supreme Court, rendered in 1904, several important legal questions were settled, the chief significance of the decision in relation to economic development was that the device of a holding company to procure a combination of competing interests in restraint of trade was unlawful. The holding company was enjoined from voting the stock held by it, and the railroad companies were enjoined from paying any dividends to the holding company on such stock, etc.

This decision, which condemned the device of the holding company for the purpose of procuring a common control of competing interests, was of capital importance in the interpretation of the Sherman Antitrust Act, and of great significance with respect to subsequent economic development.

[1] See pp. 73, 103.

DECLINE OF CONSOLIDATIONS AND DEVELOPMENT OF "GENTLEMEN'S AGREEMENTS" AND "COOPERATION."—Prior to the decision in the Northern Securities case, the tendency seems to have been toward the formation of consolidations either by merger or through the device of the holding company. Subsequent to that decision, in so far as monopolistic combinations of competing interests were made, they did not often take the form of the holding company. It may be noted that the American Tobacco Co., which prior to 1904 was largely a holding company, was reorganized about seven months after the decision in the Northern Securities case in the form of a merger with respect to the properties of the principal concerns combined, which appears to have been prompted in part by the decision in that case.[1] It may be noted also that the International Harvester Co., which was formed subsequent to the initiation of the Government suit against the Northern Securities Co. but before the final decision, was a merger of the manufacturing properties of competing interests. The decision in the Northern Securities case, as well as the increased activity of the Government in the investigation and prosecution of suits against consolidations, was apparently of great influence in preventing further efforts to restrict competition by such means. It was not until several years later, however, that the Supreme Court expressly declared that a merger for such purposes was illegal.

Legal difficulties had at an earlier date, as noted above, discouraged the use of written price and pooling agreements as a means of combination, and tended to promote combination through consolidation, but the decision in the Northern Securities case, as just stated, tended to discourage efforts at combination in this form also. Thereafter, apparently, the device most available for evading the Antitrust Law was the looser and unwritten form of agreement generally described as a "gentlemen's agreement." This device became known somewhat later as the system of "cooperation," which is particularly well illustrated in certain combinations at one time practiced by steel manufacturers. The fundamental idea of such cooperation was to procure substantial harmony in policy among competitors regarding volume of output and prices, without specific written or oral agreements, but rather by tacit understandings and the communication of information regarding the production and prices of the various cooperating interests in order to insure good faith in the performance of the tacit understandings. A particular variation of this policy was the apparent tacit understanding to follow the price quotations of the "leading interest," as , for example, the American Tin Plate Co., for tin plate, and the Reading Coal & Iron Co., for anthracite coal.

INCREASE OF ACTIVITY IN THE PROSECUTION OF TRUSTS.—The Northern Securities decision, by declaring the holding-company

[1] Report of the Commissioner of Corporations on the Tobacco Industry, Part I, p. 11.

device for forming combinations illegal, gave a great impetus to the prosecution of trusts, which at that time were frequently organized in the form of holding companies.

This activity was greatly stimulated, moreover, by the work of the Bureau of Corporations, which in a series of reports on some of the most conspicuous trusts in the country showed more fully and authoritatively than had been done theretofore their real economic basis and character. The Bureau's reports on the petroleum industry and tobacco industry were of special importance, these two industries being dominated by the Standard Oil Co. and the American Tobacco Co., respectively, two of the largest and most obnoxious of the trusts. In this connection may be also noted the fact that the Bureau's report on the Standard Oil Co.'s railroad rebates had a powerful influence in promoting the passage of the Hepburn Act of 1906 for the further regulation of railroads engaged in interstate commerce. In the prosecution of these trusts, moreover, the Department of Justice obtained and made extensive use of information collected by the Bureau of Corporations. While a variety of suits were initiated by the Government the determination of the Standard Oil and Tobacco cases were of paramount importance with regard to the future development of the more powerful and more concentrated forms of combination.

Section 9. Standard Oil and Tobacco decisions and their results.

STANDARD OIL AND TOBACCO DECISIONS (1911).—While the record in the Standard Oil and the American Tobacco Co. cases as well as the reports of the Bureau of Corporations showed clearly the monopolistic character of these great trusts, various circumstances made it seem doubtful at first whether they would be condemned by the courts or not. This was due particularly to the decision in the Knight case, the authority of which it was alleged had never been directly questioned by the Supreme Court.

The decisions in the Standard Oil[1] and the American Tobacco Co.[2] cases, rendered in 1911, were both victories for the Government. The unlawfulness of the holding-company device to accomplish a combination in restraint of trade, as decided in the Northern Securities case, was affirmed, and in the Tobacco case the actual merger of the properties of competing concerns which accomplished the same ends was likewise declared unlawful. The Knight case thereby lost all practical significance in the determination of the lawfulness of such combinations. While in the earlier trust cases emphasis was generally placed on the first section of the Antitrust Act, prohibiting combination in restraint of trade, in the Oil and Tobacco cases and in other recent cases stress has also been laid on the second section, which denounces those who monopolize or attempt to monopolize

[1] See pp. 86, 90, and 104.

[2] See pp. 88 and 99.

interstate commerce. In the interpretation of this section the court has given a broad meaning to the term "monopolize," and it has attached importance to the existence of unfair practices as evidencing an attempt to monopolize.

CHARACTER AND EFFECT OF DISSOLUTIONS.—The court directed that the Standard Oil Co. should be reorganized in such a manner as to bring it into harmony with the law, but did not prescribe in detail in what way it should be accomplished. The decree of the lower court, which was approved in substance by the Supreme Court, prohibited the Standard Oil Co. from either voting stock which it held in the subsidiary companies or receiving dividends thereon, and enjoined the Standard Oil Co. from exercising any control over the operations of any of its subsidiaries, but it suggested that the stocks of the subsidiary companies might be distributed ratably among the holders of the stock of the Standard Oil Co. of New Jersey.[1] The

[1] The most essential parts of the decree are contained in secs. 5 and 6 as follows:

"SEC. 5. That the stocks of the various corporations which are named in section 2 and described in section 4 of this decree, held by the Standard Company, were acquired and are held by it by virtue of the illegal combination; that the Standard Company, its directors, officers, agents, servants, and employees, are enjoined and prohibited from voting any of the stock in any of the subsidiary companies named in section 2 of this decree and from exercising or attempting to exercise any control, direction, supervision, or influence over the acts of these subsidiary companies by virtue of its holding of their stock. And these subsidiary companies, their officers, directors, agents, servants, and employees are, and each of them is, enjoined and prohibited from declaring or paying any dividends to the Standard Company on account of any of the stock of these subsidiary companies held by the Standard Company, and from permitting the latter company to vote any stock in, or to direct the policy of, any of said companies, or to exercise any control whatsoever over the corporate acts of any of said companies by virtue of such stock, or by virtue of the power over such subsidiary corporation acquired by means of the illegal combination. But the defendants are not prohibited by this decree from distributing ratably to the shareholders of the principal company the shares to which they are equitably entitled in the stocks of the defendant corporations that are parties to the combination.

"SEC. 6. That the defendants named in section 2 of this decree, their officers, directors, agents, servants, and employees, are enjoined and prohibited from continuing or carrying into further effect the combination adjudged illegal hereby, and from entering into or performing any like combination or conspiracy, the effect of which is, or will be, to restrain commerce in petroleum or its products among the states, or in the territories, or with foreign nations, or to prolong the unlawful monopoly of such commerce obtained and possessed by defendants as before stated, in violation of the act of July 2, 1890, either (1) by the use of liquidating certificates, or other written evidences of a stock interest in two or more potentially competitive parties to the illegal combination, by causing the conveyance of the physical property and business of any of said parties to a potentially competitive party to this combination, by causing the conveyance of the property and business of two or more of the potentially competitive parties to this combination to any party thereto, by placing the control of any of said corporations in a trustee, or group of trustees, by causing its stock or property to be held by others than its equitable owners, or by any similar device, or (2) by making any express or implied agreement or arrangement together, or one with another, like that adjudged illegal hereby relative to the control or management of any of said corporations, or the price or terms of purchase, or of sale, or the rates of transportation, of petroleum or its products in interstate or international commerce, or relative to the quantities thereof purchased, sold, transported, or manufactured by any of said corporations, which will have a like effect in restraint of commerce among the states, in the territories, and with foreign nations to that of the combinations the operation of which is hereby enjoined." (United States *v.* Standard Oil Co., 173 Fed., 199-200.)

These provisions of the decree made by the lower court were approved by the Supreme Court, with certain modifications, of which the following are the only ones of present interest:

"But the contention is that, in so far as the relief by way of injunction which was awarded by section 6 against the stockholders of the subsidiary corporations or the subsidiary corporations themselves after the transfer of stock by the New Jersey corporation was completed in conformity to the decree, the relief awarded was too broad: a. Because it was not sufficiently specific and tended to cause those who were within the embrace of the order to cease to be under the protection of the law of the land and required them to thereafter conduct their business under the jeopardy of punishments for contempt for violating a

Standard Oil Co. was dissolved in accordance with this suggestion by simply dividing the stocks held by the holding company in its subsidiaries among the stockholders of the said holding company. As a comparatively few closely associated capitalists possessed a majority of the stock of the holding company they consequently became the controlling stockholders in each of the several separated companies. The general opinion is that this dissolution is effective neither in theory nor in fact. There is much ground for believing that it did not result in independent action or active competition between the various subsidiary companies. The public advantage of the dissolution has also been questioned, on the ground that prices were not immediately reduced, but on the contrary were increased. As such an advance in prices might occur under conditions of active competition, it would not be proper to assume this as proof of continued violation of the law without careful investigation. Moreover, there has been a marked decrease in prices since then, corresponding with decreases in the prices of crude oil. While the position of the independents has undoubtedly been improved, this is not satisfactory evidence of the effectiveness of the dissolution. That the dissolution of the Standard Oil Co. was not more satisfactory in form and results appears to be due, however, to the manner of its accomplishment rather than to any inherent difficulty in reestablishing competitive conditions among the component parts of the combination.

In the dissolution of the American Tobacco Co. the Supreme Court went further and ordered that the court below should hear the parties "for the purpose of ascertaining and determining upon some plan or method of dissolving the combination and of recreating, out of the elements now composing it, a new condition which shall be

general injunction. *New Haven R. R.* v. *Interstate Commerce Commission*, 200 U. S. 404. Besides it is said that the restraint imposed by section 6—even putting out of view the consideration just stated—was moreover calculated to do injury to the public and it may be in and of itself to produce the very restraint on the due course of trade which it was intended to prevent. We say this since it does not necessarily follow because an illegal restraint of trade or an attempt to monopolize or a monopolization resulted from the combination and the transfer of the stocks of the subsidiary corporations to the New Jersey corporation that a like restraint or attempt to monopolize or monopolization would necessarily arise from agreements between one or more of the subsidiary corporations after the transfer of the stock by the New Jersey corporation. For illustration, take the pipe lines. By the effect of the transfer of the stock the pipe lines would come under the control of various corporations instead of being subjected to a uniform control. If various corporations owning the lines determined in the public interests to so combine as to make a continuous line, such agreement or combination would not be repugnant to the act, and yet it might be restrained by the decree. As another example, take the Union Tank Line Company, one of the subsidiary corporations, the owner practically of all the tank cars in use by the combination. If no possibility existed of agreements for the distribution of these cars among the subsidiary corporations, the most serious detriment to the public interest might result. Conceding the merit, abstractly considered, of these contentions they are irrelevant. We so think, since we construe the sixth paragraph of the decree, not as depriving the stockholders or the corporations, after the dissolution of the combination, of the power to make normal and lawful contracts or agreements, but as restraining them from, by any device whatever, recreating directly or indirectly the illegal combination which the decree dissolved. In other words we construe the sixth paragraph of the decree, not as depriving the stockholders or corporations of the right to live under the law of the land, but as compelling obedience to that law. * * *" (Standard Oil Co. *v.* United States, 221 U. S., 80–81.)

honestly in harmony with and not repugnant to the law." The American Tobacco Co. submitted a plan of dissolution which in its main features was adopted by the court.

The plan as adopted provided, among other things, for (1) the abrogation of numerous restrictive covenants by which various tobacco companies had bound themselves not to engage in the tobacco business, (2) the disintegration of certain subsidiary combinations in particular branches of the business, namely, the tin foil, licorice, snuff, stogie, and cigar companies, (3) the distribution of the stocks of numerous subsidiary companies of the American Tobacco Co. among the shareholders of that company, and (4) the transfer of a part of the property and business of the American Tobacco Co. to two new companies to be organized, namely, Liggett & Myers Tobacco Co., and P. Lorillard Co., in such a manner that each of these three companies should have a large part of each branch of the tobacco business possessed by the American Tobacco Co., the stockholders of the American Tobacco Co. becoming, pro rata, stockholders in each of these three companies. In this manner out of the companies formerly combined there were released or constituted 14 different companies [1] besides a number of other former subsidiary companies whose stocks were distributed as stated above.

The court ordered that the defendants should be enjoined from carrying out the combination or any combination of a like character to that adjudged illegal, especially by any of the following acts: (*a*) With respect to the 14 companies mentioned above and without limitation of time (1) by conveying the property or business of any one of them to any other, (2) by placing the stocks of two or more of them in a voting trust, (3) by making any agreement for common management, or with regard to the price of tobacco or tobacco products or with regard to apportioning the trade therein, or for the employment of common clerical staff or offices, (4) by doing business secretly under any other name, (5) by refusing to sell goods desired by jobbers in certain cases; (*b*) for a period of five years the same 14 companies were enjoined (1) from having common officers, directors, or agents for the purchase or sale of goods, (2) from acquiring the stocks or property of any of the said companies, or (3) from extending financial aid to them; (*c*) for a period of three years the 29 individual defendants (the chief stockholders of the combination) were enjoined from increasing their stock holdings in any of these 14 companies, except one foreign concern. Most of the injunctions applied to the 14 companies, but those against agreements affecting prices and apportionment of business apparently extended to all parties to the combination with respect to any of its elements.

[1] The 14 companies were: The American Tobacco Co., Liggett & Myers Tobacco Co., P. Lorillard Co., American Snuff Co., George W. Helme Co., Weyman-Bruton Co., R. J. Reynolds Tobacco Co., British-American Tobacco Co. (Ltd.), Porto Rican-American Tobacco Co., MacAndrews & Forbes Co., J. S. Young Co., The Conley Foil Co., The Johnston Tin Foil & Metal Co., and United Cigar Stores Co.

The Government requested the court to incorporate numerous other restrictive provisions in the decree for the purpose of procuring a more effective dissolution and of insuring that competitive conditions would be reestablished. Some of these were adopted by the court, but many of them were denied.[1]

In particular, the court denied the request of the Government that the manner and form of the dissolution might be tested by practice, and if not satisfactory that the Government should be allowed to apply for further relief (within a period of five years) to procure a satisfactory arrangement. The court also denied the request of the representatives of the independents that "common stock holding" (i. e., the holding of the stocks of all the companies by the same group of stockholders) should be prohibited.[2]

The tobacco company dissolution has been criticized in the same way as the oil company dissolution, but probably with less force.[3]

It has generally been observed that both in framing the plans for the dissolution of trusts and in the supervision of the execution of these plans it would be highly desirable to have some administrative

[1] Among the restrictions which the Government urged should be incorporated in the decree which were not adopted by the court were the following: (1) That no company established under the decree should have more than 40 per cent of the output of any particular kind of tobacco product. The court denied this, saying that the instances in which the proposed allotments of business exceeded 40 per cent were few and the excess over 40 per cent negligible. (2) That giving rebates or other special inducements to purchasers should be prohibited. The court denied this on the ground that all other companies were free to employ such means under the law. (3) That espionage on the business of a competitor, bribery of employees of such competitor, or obtaining information from United States revenue officials, should be prohibited. The court denied this, saying that when illegitimate methods were proved they could be dealt with. (4) That every independent or other person interested should have the right to apply to the court for protection if the injunction were violated. The court denied this, on the ground that the court would be overwhelmed with applications, mainly frivolous, and said that such complaints should be made to the Attorney General. (5) That the stock of the United Cigar Stores Co. should be sold and distributed to other persons than the 29 individual defendants. The court declared that it had not the power to penalize parties to the suit except in the manner provided in the law, and denied this request. (6) Finally, it may be noted that the Attorney General requested that the Government should have the right to reopen the case at any time within five years, with a view to obtaining further relief in case the plan of dissolution adopted did not prove satisfactory. The court held that it had not the power to establish such a modus vivendi and that even its power to make the form of dissolution adopted would have been questionable if not expressly authorized by the Supreme Court.

[2] Besides the modifications to the plan recommended by the Attorney General, numerous other changes, many of which were of a much more extensive character, were proposed by the representatives of other interests. The most important of these was that common holding of stock in the various new companies by the stockholders of the American Tobacco Co. should be prohibited, on the ground that no real competition between the new companies could exist unless such prohibition were made. With regard to this request the court said in part:

"With this argument or the reply to it, it seems to me this court is not concerned. In two recent cases (the Northern Securities and the Standard Oil) the Supreme Court found a combination of corporations to have offended against the Anti-Trust Act. As a result of such finding there was a disintegration of the combination. In each case the disintegration left the stock of the separate entities into which the group was split in the hands of the same body of individual stockholders. Since there was no disapproval of this method of disintegration indicated in either opinion, it would seem that the question whether or not common stockholding is 'repugnant to the law,' that is, repugnant to the Anti-Trust Act, has been settled for this court by controlling authority.

"It is true that the Supreme Court did not enter into a discussion of this question of 'common ownership,' but its existence in both cases was so plainly manifest that it is difficult to understand how the court could have approved of the new arrangement unless it was satisfied that such arrangement did not contain the same vice as the old one which they held must be terminated."

[3] See Report of the Commissioner of Corporations on the Tobacco Industry, Part III.

organ of the Government which could advise the court in the first instance and act for it subsequently.[1]

PROSECUTION OF THE STEEL CORPORATION, ETC.—The victory of the Government against the oil and tobacco trusts was followed by similar results in a number of other cases, and the prosecution of the trusts was actively continued. Having succeeded against the oil trust, which was generally regarded as the archetype of trusts and the worst offender, the Government then turned its attention to certain other combinations claimed by some to be "good" trusts (on the assumed ground that they did not try to exact unduly high prices or to destroy their competitors), notably the United States Steel Corporation and the International Harvester Co.

The Government's position was that not only was the Steel Corporation itself a combination contrary to the Antitrust Act, but also that it had combined with the chief independent producers to artificially control prices under the so-called "cooperative" system.

Section 10. The Federal Trade Commission and supplementary antitrust legislation, 1914.

PUBLIC AGITATION TO MODIFY THE SHERMAN LAW.—The Standard Oil and Tobacco decisions made it plain that the great trusts were unlawful and that they could be dissolved. Following these decisions the whole question of Government policy regarding the regulation of combinations and monopoly became a matter of public discussion.

Concurrent with this development, a number of investigations were conducted by congressional committees into certain monopolized industries, namely, steel and sugar, and also into the so-called "money trust."

STATE REFORM OF CORPORATION LAW.—That defective State laws are partly responsible for the growth of monopolistic organizations is generally recognized, and has led to some reforms in State legislation. The most comprehensive effort in reforming State legislation with this purpose in view is found in the "Seven Sisters" laws of New Jersey, which were passed in 1913. They are found in chapters 13 to 19, inclusive, of the laws of the New Jersey Legislature for 1913. These laws, as well as other State antitrust laws, are described in Chapter IV.

FEDERAL TRADE COMMISSION.—The President, in an address before a joint session of Congress on January 20, 1914, recommended the establishment of a Federal trade commission, and said, in part:

> The opinion of the country would instantly approve of such a commission. It would not wish to see it empowered to make terms with monopoly or in any sort to assume

[1] See Federal Trade Commission act, pp. 22, 129.

control of business, as if the Government made itself responsible. It demands such a commission only as an indispensable instrument of information and publicity, as a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided, and as an instrumentality for doing justice to business where the processes of the courts or the natural forces of correction outside the courts are inadequate to adjust the remedy to the wrong in a way that will meet all the equities and circumstances of the case.

As the first result of the movement for additional Federal legislation, Congress passed a law establishing a Federal Trade Commission, which was approved on September 26, 1914. The provisions of this law are set forth in more detail in Chapter III. (See p. 128.)

It is sufficient to note here that this act provides for a commission which shall absorb the Bureau of Corporations and which is intrusted with broad powers of investigation and of recommendation with respect to the enforcement of the antitrust acts and the right to require annual and special reports from corporations subject to its jurisdiction. In particular it may be noted that the commission is empowered to act as a master in chancery in the preparation of decrees made in the execution of the antitrust acts in such cases as may be referred to it by the courts. Further, the Federal Trade Commission is clothed with important quasi judicial powers in the interpretation of a provision of declaratory law embodied in this act, namely, "That unfair methods of competition in commerce are hereby declared unlawful." The Federal Trade Commission is empowered to prevent persons, corporations, etc., from using such unfair methods of competition in interstate and foreign commerce. It was stated by the committees of Congress which had jurisdiction of the Federal Trade Commission bill that this provision regarding unfair methods of competition was incorporated on the theory that the prevention of such unfair competition was one of the most important means of preventing the development of monopolies.

This act also expressly provides that the antitrust acts are in no way modified by anything contained in it.

CLAYTON ANTITRUST ACT.—A second result of the agitation for additional Federal trust legislation was the enactment of the Clayton Antitrust Act of October 15, 1914, which, according to its title, was intended to supplement the existing antitrust acts. A more detailed description of this act is given in Chapter III. (See p. 132.)

It is sufficient to note here merely the chief features and purposes of this law from the point of view of the development of trust legislation, which are as follows: (1) Certain practices in so far as they tend substantially to lessen competition, etc., are prohibited in certain cases, namely, (*a*) price discrimination, (*b*) tying contracts, (*c*) the holding by one company of the stock of another company, and (*d*) common directors or officers in different companies. With respect to these questions, quasi judicial powers are given to the

Interstate Commerce Commission, the Federal Reserve Board, and the Federal Trade Commission, according to their respective jurisdictions, these powers being substantially the same as those of the Federal Trade Commission with respect to unfair methods of competition. (See p. 130.) (2) The declaration is made that labor is not a commodity nor an article of commerce, and further that the antitrust acts shall not be construed to forbid the existence of certain kinds of labor and agricultural organizations, nor to forbid their members from lawfully carrying out their legitimate objects, nor shall such organizations be construed to be illegal under the antitrust laws. This law contains various other important provisions, but they are of less interest in connection with the development of the Antitrust Law.

The provisions of the Clayton Act first referred to above were intended, apparently, to prevent certain practices which were regarded as lessening competition or tending to monopoly, but which, it was feared, would not always in themselves be sufficient to bring the person who practiced them within the scope of the Sherman Antitrust Act. While some effects have already manifested themselves with respect to the forms of business organization, this legislation is of too recent a date to make it possible to form any accurate estimate of its broader consequences.

CHAPTER II.

COMMON-LAW DECISIONS BY COURTS IN THE UNITED STATES IN REGARD TO AGREEMENTS IN RESTRAINT OF TRADE.

Section 1. Introduction.

The decision of the United States Supreme Court in the Standard Oil case made it evident that the words "restraint of trade" in the Sherman Act should be construed as declaratory of the common law so far as the meaning of that term was concerned. (See pp. 86–87.) This view had been taken by the dissenting members of the Court in the Trans-Missouri case. (See p. 85.) Even in the latter case the majority of the court had expressly declared that there were certain contracts which might not be included in the letter or spirit of the statute. A proper understanding of this term as used in the Sherman Act, therefore, requires a knowledge of the common-law decisions.

This knowledge is important for the reason that the rules set forth in these decisions form the basis of jurisprudence in every State where no antitrust statutes have been enacted; where such statutes have been held unconstitutional, ineffective, or inapplicable; where they have been repealed; and where, as in Massachusetts (see p. 204), the statutes are expressly declaratory of the common law. (See Chap. IV.) The importance of the common law decisions becomes even more evident when it is perceived to what extent the courts, in deciding cases under both State and Federal statutes, have cited such decisions.

No method of presenting the common-law decisions is satisfactory, however, which does not involve a careful examination of a considerable number of representative cases. It is obvious that the principles upon which some agreements have been held valid and others invalid will be much better understood if, in connection with the decisions, the essential facts in particular cases are examined, together with the reasoning contained in the opinion of the court. It can not be expected, however, that a complete agreement will be found in all the cases, but it is probable that there is as much consistency in the decisions on this subject as in those relating to other subjects.

In carrying out the method of presentation indicated, it has been found that the cases cover so wide a variety of circumstances that

it is difficult to classify them satisfactorily, but to make the presentation somewhat clearer for present purposes, the following principal groups will be considered, namely:

(1) Agreements connected with the sale of a business.

(2) Agreements among competitors to restrict competition.

(3) Agreements among competitors to consolidate under common ownership or control.

In these three groups of cases it will be observed that the first group includes agreements by which the vendor of a business agrees not to reengage in the business as a competitor of the purchaser. In the second group the agreement is one to regulate the conditions of competition between those who are trade rivals and who continue as such, subject to the restrictions of the agreement. The third group includes agreements whereby the ownership or control of competing businesses is combined in the same hands.

The present report, however, is more intimately concerned in the cases of the second and third groups, namely, those which are more likely to be of a monopolistic character or to have a monopolistic tendency. Agreements between the buyer and seller of a business included in the first group may also be monopolistic in character or tendency when accompanied by circumstances from which it appears that the contract has been entered into as a device to lessen competition, enhance prices, or secure or build up control of the market, as where a buyer acquires the business of several competing vendors. It is clear that in themselves the agreements of the first group do not necessarily tend to give the buyer control of the market.

This class of cases must be briefly considered here, however, in order to understand the present meaning of the term "restraint of trade" in the light of its development, since it was to this class of cases that the term was originally applied and to which it was largely confined in the early decisions.

The use of unfair competitive methods may afford substantial evidence of an intention unduly to restrain trade or competition, to secure control of the market, or to create a monopoly. It appears, however, in the common-law cases, that when such methods exist, the control of the general market is not necessarily involved. Such cases are therefore taken up elsewhere in this report. (See Chap. VII.) An important feature of cases involving unfair methods of competition is the effect of the practice upon individuals engaged in competition with the party complained of. In this class of cases considerations of the greatest public concern may be involved (especially in the result of the continued use of unfair methods), but in particular instances the effect upon the general public is usually more limited or less direct than in the cases discussed in this chapter.

Under the common law, agreements in restraint of trade, which are regarded as against public policy, are held to be void and unenforceable. The court will not aid any party whose rights are derived from such an agreement. In this sense these agreements are unlawful or illegal. By statute a criminal liability has been imposed in certain cases, especially those involving an element of conspiracy. (See pp. 2, 3.) In former times attempts to control the market in respect to victuals and other necessaries were punished as criminal offenses,[1] apparently without regard to whether a conspiracy existed or not.

Section 2. Agreements connected with the sale of a business.

Centuries ago English courts laid down the rule that contracts in restraint of trade could not be enforced. The courts were opposed to upholding any restraint, however limited. Most of the cases which came before the courts in that period involved agreements whereby the vendor of a business agreed not to reengage in the same line of trade. The courts took the view that no one should be allowed to bind himself not to carry on the trade to which he was accustomed or to limit his right to carry it on in his own way. It was believed that such a rule was in the interest of trade.

This view prevailed until early in the eighteenth century when the case of Mitchell v. Reynolds[2] was decided. In that case, after a thorough examination of the earlier decisions, the court held valid the particular agreement that was involved in the case before it. In reaching this result the court said in part:

> We are of opinion, that a special consideration being set forth in the condition, which shows it was reasonable for the parties to enter into it, the same is good; and that the true distinction of this case is not between promises and bonds, but between contracts with and without consideration; and that wherever a sufficient consideration appears to make it a proper and a useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, viz., where the restraint is general, not to exercise a trade throughout the kingdom, and where it is limited to a particular place; for the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shown by-and-by. * * *
>
> In all restraints of trade, where nothing more appears, the law presumes them bad; but if the circumstances are set forth, that presumption is excluded, and the Court is to judge of those circumstances and determine accordingly; and if upon them it appears to be a just and honest contract, it ought to be maintained.

This decision, that some restraints could be enforced, established an important modification to the earlier rule. The decision recognized the rule as to all general restraints, because it seems to have

[1] 64 L. R. A., 689n. Compare, however, Coke's Institutes, chap. 89; Hawkins's Pleas of the Crown, chap. 80, London ed., 1739; and Rex v. Waddington (1801), 1 East, 143.

[2] 1 P. Wms., 181 (1711).

been thought that there could be no question that all such restraints were bad. In cases where the restraint was limited to a particular place, however, it was held that the court should determine whether it was just and honest, having regard to the circumstances, and, if so, it should be enforced.

This decision gave rise to some confusion and uncertainty in the use of the term "restraint of trade," which has persisted until the present time. By some the term has been used to include all restraints where any limitation in fact is involved without regard to whether the contract was just and honest or not, while by others it has been used to include only those restraints which are unenforceable. Failure to observe this distinction has caused misapprehension in respect to the legal significance of the term.

This confusion has been increased by some lack of uniformity in the decisions themselves. Some courts have apparently felt constrained to follow precedents established under economic conditions that prevailed in earlier years, rather than to regard changes in such conditions as among the "circumstances" referred to in the rule laid down in Mitchell *v.* Reynolds, as to what should be taken into consideration in determining whether the contract is "just and honest." On the other hand, some courts, especially in England, in following the spirit of this rule, have gone farther in its application and even held some general restraints enforceable, as in the case of the sale of trade secrets and trade of a special character, which, although of wide extent, is confined to a limited number of customers.[1]

The dictum in Mitchell *v.* Reynolds, that a general restraint not to exercise a trade throughout the kingdom was void, has been attributed to the probability that at the time that case was decided it seemed inconceivable that an agreement to refrain from establishing a business of the same kind anywhere in the kingdom should be necessary to the protection of the good will of any business then existing.[2] In following this dictum it came to be held in England that any restraint whose limits were coterminous with the kingdom should be regarded as void, and the courts continued to apply the limits thus arbitrarily fixed, even in cases where, under more modern conditions, the circumstances might have been held to justify a more liberal interpretation of the rule. The dictum has been followed in a number of American cases which hold that an agreement involving a restraint covering, or substantially covering, an entire State is void as a general restraint.[3] This was the view taken by the court in Law-

[1] Jolly, Contracts in Restraint of Trade, p. 19 (3d ed., London, 1914).

[2] See Anchor Electric Co. *v.* Hawkes, 171 Mass., 101 (1898) at p. 105.

[3] Among these cases may be mentioned Lawrence et al. *v.* Kidder, 10 Barbour (N. Y.), 641 (1851); Taylor *v.* Blanchard, 13 Allen (95 Mass.), 370 (1866); and Western Woodenware Association *v.* Starkey et al., 84 Mich., 76 (1890). In connection with the latter case, see Beal *v.* Chase et al., 31 Mich., 490 (1875) on p. 33 of this report.

rence *v.* Kidder, cited in the note. In that case the defendants had covenanted that for five years from the date of the contract they would discontinue the manufacture and sale of palm-leaf beds or mattresses, or materials out of which such beds are made, in all the territory of the State of New York west of the city of Albany, and that they would not sell beds or materials for beds to agents of the plaintiffs in Columbus, Ohio. In an action based on an alleged breach of this contract it was held that the contract was in restraint of trade and void, the restriction embracing too large a territory. In reaching this result the court expressed itself, in part, as follows:

* * * I am of the opinion, independent of authority, that a contract prohibiting to an individual the pursuit of any trade or employment throughout the State of New York, should be regarded as a contract in total restraint of trade within the common law.

In the Massachusetts and Michigan cases cited in note 3 on page 27, the respective courts were inclined to hold that a restraint extending throughout the State is void, apparently on the ground that to uphold the restriction would result in driving business from the State and throw certain of its citizens out of employment, or cause their removal from the State. In the Massachusetts case it appeared that the plaintiff had been engaged in the manufacture and sale of shoe cutters at Marlboro, Mass.; that the manufacture could only be carried on by persons instructed in the same; that the business was then confined to the plaintiff and three other parties in other parts of the State; and that the plaintiff was doing a large and profitable business. It further appeared that the plaintiff received the defendant, who was wholly ignorant of the business, into partnership, under an agreement providing that if the partnership were dissolved the defendant should not at any time thereafter carry on the business of manufacturing or selling shoe cutters at any place within the State of Massachusetts. The defendant, after the dissolution of the partnership, engaged in the same business in Boston with a new partner, and traded with and supplied customers of the plaintiff. In holding the contract to be contrary to public policy and void, the court said:

* * * A monopoly extending throughout the State may be as really injurious to the people of the State as if it extended throughout the whole country. * * * Whatever may be the extent of the State, the monopoly restricts the citizen from pursuing his business, unless he transfers his residence and his allegiance to some other State or country. Its tendency is to drive business and citizens who are skilled in business from this to other States. * * * In the present contract the court can see nothing beneficial to the public, and are of opinion that it is contrary to the well-established policy of the law, and void.

In the Michigan case referred to, a manufacturing firm in Michigan sold their stock and material to an Illinois corporation engaged in a similar business, and agreed not to engage in the business for

five years in eight specified States, including those in which the parties resided, nor to allow the premises where they had carried on their business to be used for that purpose, without the consent of the corporation. The complainants brought suit for an injunction and an accounting, alleging that some of the defendants had procured the incorporation of a new company, to which the premises in question were indirectly conveyed, and that they had active supervision of said corporation and were engaged in competition with the complainants in the eight States specified in the agreement. From a decree dismissing the bill complainant appealed. In holding the contract void on grounds of public policy, the court expressed its opinion as follows:

> The interests of the parties alone are not the sole considerations involved here. It is the duty of the court to see that the public interests are not in any manner jeopardized. * * * Here a large manufacturing business had been established, and presumably it gave employment to quite a number of people. By the contract these people are thrown out of employment and deprived of a livelihood, and no other of the citizens of Michigan are called in to take their places. The business is no longer to be carried on here, but is removed out of the State. * * * I do not think it needs the citation of authorities to show that contracts of this nature have frequently been condemned by the courts and held void as unreasonable restraints of trade and therefore void on the ground of public policy.

On the other hand, in the State of New York, restraints covering, or substantially covering, the entire United States, have been upheld as valid. One of these agreements related to the manufacture and sale of matches[1] and another to thermometers.[2] In the Diamond Match case the defendant, who was engaged in the manufacture of matches in New York and in their sale throughout the States and Territories, sold his good will, etc., to the Swift & Courtney & Beecher Co., a corporation engaged in the manufacture of matches in Connecticut, Delaware, and Illinois, and in selling its product throughout the country. Defendant covenanted with the purchaser and assigns that he would not engage in the manufacture or sale of matches at any time within 99 years, except in the service of the purchasing company, in any of the States or Territories except Nevada and Montana, and he executed a bond in the penalty of $15,000 as liquidated damages in case of a breach of his covenant. In an action brought by the Diamond Match Co., assignee, to restrain the defendant from engaging in the manufacture or sale of matches in violation of the covenant in the bill of sale, the court held that the question as to what was a general restraint of trade did not depend upon State lines; that they were not the boundaries of trade and commerce; that a restraint was not neces-

[1] Diamond Match Co. *v.* Roeber, 106 N. Y., 473 (1887).
[2] Watertown Thermometer Co. *v.* Pool et al., 51 Hun, 157 (1889).

sarily general, which embraced an entire State; and that the covenant, being supported by a lawful consideration, constituting a partial and not a general restraint, and being, in view of the circumstances, reasonable, was valid.

It has sometimes been claimed that this decision marked a departure from the common-law rule by holding that even contracts in total restraint of trade should be upheld in order to preserve the greatest possible freedom of contract. The court, however, expressed the opinion that the public interest was not involved, and that the restraint was not total, and held that as the contract did not confer any special or exclusive privilege nor create a monopoly there was little danger that the public would suffer harm from a lack of persons to engage in a profitable industry. It was expressly pointed out that combinations stand on a different footing. The report of this case does not indicate that any question was raised by the parties or the court as to the validity of the contract on the ground that it was a part of the plan in the organization of the Diamond Match Co., which, in a Michigan case subsequently decided, was held to be an unlawful combination formed to effect a monopoly. (See p. 66.)

In the Watertown thermometer case it was alleged by the plaintiff, and admitted by demurrer, that the defendant, Julia Pool, in consideration of $5,000, by a written agreement, under seal, had sold to two persons named therein, 100 shares of the stock of the plaintiff corporation, and assigned to them the trade-mark used on thermometers and storm glasses manufactured by her; that she had authorized the transfer of such trade-mark to the plaintiff, which had its principal place of business at Watertown; and that she had also agreed "not to engage in the manufacture of any thermometers of any kind or description, nor of any storm glasses, at any place within the United States, at any time within a period of 10 years from the date" thereof. It also appeared that for the same consideration the defendant, Herbert Pool, had agreed that he would not in any manner whatever engage in the manufacture of thermometers or storm glasses within said period of 10 years. It was also alleged that all the rights secured by said agreement had been transferred to the plaintiff, and that for its full and proper development the plaintiff's business required, for a considerable period of time, the entire territory embraced under such agreement. It was further alleged that the defendants had violated their agreement by engaging in the same business at Oswego under the name of the Oswego Thermometer Works. The only question raised was as to the validity of the contract. The defendants claimed that it was in general restraint of trade and therefore void, founding this claim on the extent of territory covered by the restrictions. It was held that the restraint, though general, was at the same time coextensive only with the

interest to be protected and with the benefit meant to be conferred by the agreement; that it imposed no restriction upon the defendants which was not beneficial to the plaintiff or which was unnecessary for its reasonable protection, and that it was induced by a consideration which made it reasonable for the parties to enter into it.

In 1873 the Supreme Court of the United States, in Oregon Steam Navigation Co. *v.* Winsor[1] upheld a stipulation, coextensive with the traveled waters of a State, and covering a period of 10 years, under the following circumstances: It appeared that the California Steam Navigation Co. sold a steamer in 1864 to the Oregon Steam Navigation Co., subject to a stipulation that the latter company should not permit the said steamer to be employed upon any of the routes of travel, rivers, bays, or waters of California for a period of 10 years. Three years later the Oregon company sold the same steamer for the sum of $75,000 to Winsor and others, subject to a covenant that the vessel should not be employed upon any of the routes of travel or waters of California, or the Columbia River and its tributaries, for a period of 10 years from 1867. The Oregon company brought an action against Winsor and others, alleging as a breach of the contract that the steamer had been engaged from November 1, 1868, in the transportation of passengers and freight from San Francisco to Vallejo, being a route on the waters of California embraced in the stipulation. The supreme court of Washington Territory dismissed the case. On a writ of error to the Supreme Court of the United States it was held that the contract with the California company was not void as in restraint of trade; that the portion of the stipulation with Winsor excluding the steamer from California waters was necessary in order that the Oregon company might keep its covenant with the California company; that although the stipulation with Winsor with respect to California waters was for three years beyond the period during which the Oregon company was bound to protect the California company, the contract was divisible[2] and such portion of the stipulation was enforceable for seven years. The court was of the opinion that—

> This stipulation (with the California company) was necessary to protect the former company from interference with its own business. It had no tendency to destroy the usefulness of the steamer, and did not deprive the country of any industrial agency. The transaction merely transferred the steamer from the employment of one company to that of another situated and doing business in another State. It involved no transfer of residence or allegiance on the part of the vendee in order to pursue its employment, nor any cessation or diminution of its business whatever. The presumption is that the arrangement was mutu-

[1] 87 U. S., 64 (1873).

[2] Among other cases in which an agreement in restraint of trade has been held divisible are Lange *v.* Werk, 2 Ohio State, 520 (1853); Thomas *v.* Miles, 2 Ohio State, 274 (1854); and Smith's Appeal, 113 Pa. State, 579 (1886).

ally beneficial to both companies, and that it promoted the general interests of commerce on the Pacific coast.

* * * the covenant made by the defendant seems to stand on the same ground as that made by the plaintiffs with the California company. The same observations may be made with reference to it. The public was not injured by being deprived of any of the business enterprise of the country. The vendees did not incapacitate themselves from carrying on business just as they had previously done, and in the same locality. Their business was rather facilitated by the arrangement. Finally, the stipulation, it will be presumed, was founded on a valuable consideration in its influence upon the price paid for the steamer; its object and purpose was simply to protect the vendors, and if we except the three years before considered in its relation to California, its restraining effect extended no farther than was necessary for their protection.

In connection with the above case it will be noted that the agreement related only to the use of a particular steamer. It will also be noted that the restraint imposed was upon the purchaser and not upon the vendor.[1]

The later cases seem to indicate a disposition on the part of the courts to apply the rule as to restraint of trade by taking into consideration the conditions under which business is actually carried on at the particular time in question, and evince a tendency (where no injury to the public is involved) to uphold a restraint extending beyond the limits of a State wherever necessary and fair to protect the purchaser in respect to the good will of the business acquired by him.

A restraint without limit of place or time is void,[2] as are also agreements under which the seller agrees not to reenter the same business within a specified time but without any provision as to place.[3]

Numerous cases have been decided upholding particular restraints where the restraint was regarded as reasonable. Two Indiana cases afford examples of the application of the rule to early cases of this kind. Bowser et al. *v.* Bliss et al.,[4] was an action of debt on a note payable to Bliss and others in consideration of a sale by the latter of their right of making, selling, and trading fanning mills south of

[1] Dunlop et al. *v.* Gregory et al. (10 N. Y., 241 (1851) was somewhat similar in its facts, but the restraint imposed was more limited as to place, but unlimited in time. The court held that the agreement was valid, there being a consideration, and it appearing under the circumstances that the contract was reasonable and useful, the restraint imposed not being larger than was necessary for the protection of the covenantee.

[2] Alger *v.* Thacher, 19 Pickering (36 Mass.), 51 (1837). This was an action of debt brought on a bond which recited that the plaintiff had purchased of the defendant 337 shares of the stock of the South Boston Iron Co., and had paid to him a large sum of money. The bond recited that the defendant should not undertake, at any time thereafter, "in his own name or in the name of another, to conduct, carry on, use, or employ the art, trade, or occupation of an iron founder or caster, or be concerned, interested, employed, or engaged, directly or indirectly, in any manner whatsoever, or under any pretense whatsoever, in the business of founding or casting of iron." On demurrer it was held that the bond was void, being in restraint of trade generally.

[3] In this connection see Wiley *v.* Baumgardner et al., 97 Indiana, 66 (1884), and Bishop *v.* Palmer et al., 146 Mass., 469 (1888).

[4] 7 Blackford, 344 (1845). See also Beard et al. *v.* Dennis, 6 Indiana, 200 (1855).

the Wabash River, within 30 miles of Marion, within which bounds they agreed not to reenter the business. The defendants alleged that, as the contract was in restraint of trade, it was illegal. The court held, however, that the restriction as to space was not unreasonable, considering the nature of the business and the newness of the country, and, further, the fact that the restraint was indefinite in point of time did not invalidate the contract.

In Duffy et al. *v.* Shockey[1] the plaintiffs had sold the good will of their marble shop in Covington to the defendant, binding themselves "not to start a marble shop at any point nearer Covington than La Fayette or Terre Haute, nor for the same distance east and west of the Wabash River at Covington," so long as the defendants should carry on the business in Covington. In an action to recover the purchase price the defendant alleged that one of the plaintiffs established a shop at La Fayette and sold large amounts within the territory named, and that the other took contracts within said territory and procured the work to be done, partly in the shop in La Fayette and partly in a shop in Covington, in which it was alleged he had an interest. In affirming a judgment for the defendant the court held that the contract was valid, the restriction being reasonable, and that the sales within the territory named constituted a breach of the agreement. The court was of the opinion that it was important in such a case to inquire whether the public interest within the limits specified would suffer by the interdiction, but declared that it was manifest from the evidence in this case that it would not.

Similar results were reached in Beal *v.* Chase et al.[2] and in Whitney et al. *v.* Slayton.[3] In the former case it appeared that Chase, the proprietor of a prosperous printing business in Ann Arbor (in connection with which he published a popular receipt book), for a large and adequate consideration sold his printing establishment, the receipt book and copyrights, the good will of the business, and the right to use his name in connection with the book and business, and agreed not to engage directly or indirectly in the business of printing and publishing in the State of Michigan as long as the purchaser should remain in such business in Ann Arbor. Chase subsequently became the president of a new corporation, which became a formidable rival of the purchaser of the old business. In a suit instituted by the purchaser, the court held that the contract was valid, not unreasonable, and based on a full consideration. The court stated that—

> One of us has doubted whether it [the agreement] could properly include the whole State; but, considering the rule to the contrary as somewhat arti-

[1] 11 Indiana, 70 (1858). [2] 31 Mich., 490 (1875). [3] 40 Maine, 224 (1885).

ficial, he concurs in maintaining the agreement.[1] Although some questions might arise as to whether a corporation could be restrained from dealings prohibited to a stockholder, merely because it had such a stockholder, we do not discuss that, because Chase's connection with this company was something more, and the terms of the decree can not fairly be wrested into any unreasonable meaning.

In Whitney et al. *v.* Slayton, the defendant, having sold his iron foundry at Calais to the plaintiffs, executed a bond in the sum of $5,000, conditioned that he would not engage in the business of iron casting within 60 miles of Calais for a term of 10 years. In an action of debt on the bond, evidence was introduced tending to show that the defendant, after executing the bond, erected a foundry, machine shop, and other buildings in Calais, and sold the same to an incorporated company; that he held stock in that company; and that he was employed as a foreman in carrying on the business. A verdict was found for the plaintiff, and the defendant filed exceptions, urging, among other grounds, that the bond was void, its conditions being in restraint of trade. The court, taking into consideration the fact that the wants of the community might ordinarily be expected to be supplied by one such establishment at that place, much of the country within 60 miles of Calais not being densely inhabited, with few places of considerable business therein, held that under such circumstances the contract was valid; that if the defendant was a stockholder in the corporation he was engaged in iron casting within the meaning of the contract; and that his being in the service of the corporation was also a violation of the agreement.

In Robinson *v.* Suburban Brick Co.,[2] the facts were as follows: Four brick manufacturers owning plants located at neighboring points in Ohio and West Virginia agreed to convey their plants to a corporation to be organized, which would have its principal place of business at Wheeling, W. Va. In payment for the plants so conveyed, the manufacturers were to receive specified amounts of stock in the new company. Each party agreed not to engage in the brickmaking business or in any lines that should be manufactured thereafter at any of the plants to be operated by the new corporation, or to furnish means, aid, or advice to others seeking to do so in such a way as to come in competition with said corporation within 50 miles of Wheeling within a period of 10 years from the date of the agreement. Robinson subsequently sold his interest in the new corporation (which was called the Suburban Brick Co.) and became a stockholder in the Standard Brick & Stone Co., a corporation engaged in a similar business within 10 miles of

[1] In this connection see Western Woodenware Association *v.* Starkey et al., 84 Mich., 76 (1890), on p. 28.

[2] 127 Fed., 804 (1904).

Wheeling. The Suburban Brick Co. sought to compel the specific performance of the above agreement and to enjoin Robinson from prosecuting the business as manager or adviser of the Standard Brick & Stone Co., or any others seeking to engage in business within said territory. The answer attempted to justify the breach by the defendant, who insisted that the agreement was unlawful and invalid under the laws of the State of Ohio, under the trust laws of the United States, at common law, and against the principles of equity. The relief prayed for was granted and an injunction ordered, to remain in force until the date fixed by the agreement. On appeal the court affirmed the decree. In this case the court seems to have confined itself to a consideration of the restrictive agreement that had been entered into by the defendant, and, except as may have been intimated in its refusal to hold the transaction void under the Sherman law on the ground that that law did not relate to manufactories within a State, the court does not seem to have gone into the question of the legality of the plan by which the various plants were to be conveyed to a single owner.[1] (See sec. 4 of this chapter.)

The principle on which the validity or invalidity of restrictive agreements entered into in connection with the sale of a business[2]

[1] Where the parties to a restrictive agreement have been competitors, and one in disposing of his business to the other agrees not to reenter the business within specified limits, it has been held that the mere allegation of the vendor of an illegal purpose on the part of the purchaser to form a monopoly did not invalidate the agreement which, in the opinion of the court, was not unreasonable and only coextensive with the business which the vendor agreed to relinquish and the purchaser expected to acquire. Thus, in Chappel *v.* Brockway (21 Wend., 157), a New York case decided in 1839, it appeared that the Rochester & Buffalo Packet Boat Co. and the defendant were competitors for business on the Erie Canal, each running a line of boats between Rochester and Buffalo. The defendant, for the consideration of $12,500, sold his boats and other property connected with them to this company and entered a bond in the penal sum of $25,000 that he would not at any time thereafter own, run, or be interested in any line of packet boats on the canal from Rochester to Buffalo. In an action on this bond the defendant pleaded that the packet-boat company, by reducing fares, had compelled him to sell out to them, that the object was to obtain a monopoly, that prices had been subsequently raised at the expense of the public, and that under these circumstances he became the owner of a new line of boats by means of which travelers were again afforded a cheap, safe, and convenient mode of transportation. The court sustained the plaintiff's contention that the defendant had not stated sufficient grounds to invalidate the bond. In reaching this conclusion the court expressed its opinion as follows:

"* * * * it is enough that the contract is good upon its face and the plea does not clearly prove that it was injurious to the public."

[2] Other cases involving various aspects of the doctrine discussed in section 2 are Weller et al. *v.* Hersee, 10 Hun, 431 (N. Y., 1877); Hall's Appeal, 60 Pa. St., 458 (1869); Moore & Handley Hardware Co. *v.* Towers Hardware Co., 87 Ala., 206 (1888); Harrison et al. *v.* Lockart, 25 Ind., 112 (1865); McAllister *v.* Howell, 42 Ind., 15 (1873); Gompers et al. *v.* Rochester, 52 Pa. St., 194 (1867); Presbury *v.* Fisher & Bennett, 18 Mo., 50 (1853); Tode et al. *v.* Gross, 127 N. Y., 480 (1891); Harkinson's Appeal, 78 Pa. St., 196 (1875); Holbrook *v.* Waters, 9 Howard's Prac. (N. Y.), 335 (1854); Doty *v.* Martin, 32 Mich., 462 (1873); Herreshoff *v.* Boutineau, 17 R. I., 3 (1890); Morse Twist Drill & Machine Co. *v.* Morse, 103 Mass., 73 (1869); Carroll *v.* Giles, 30 S. C., 412 (1888); Stines *v.* Dorman, 25 Ohio State, 580 (1874); Hodge, executor, *v.* Sloan, 107 N. Y., 244 (1887); Clark *v.* Frank, 17 Mo. App., 602 (1885); Grasselli *v.* Lowden, 11 Ohio State, 349 (1860); California Steam Navigation Co. *v.* Wright, 6 Cal., 258 (1856); and Leslie *v.* Lorillard et al., 110 N. Y., 519 (1888).

should be determined was expressed by the court in Hubbard *v.* Miller[1] in the following words:

> If, considered with reference to the situation, business and objects of the parties, and in the light of all the surrounding circumstances with reference to which the contract was made, the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them and not specially injurious to the public, the restraint will be held valid. A contract of this kind requires no greater pecuniary or valuable consideration to support it than any other contract; but such consideration, however valuable, will not of itself support it. Whether it can be supported or not depends upon matters outside of and beyond the abstract fact of the contract or the pecuniary consideration; it will depend upon the situation of the parties, the nature of their business, the interests to be protected by the restriction, its effect upon the public; in short, upon all the surrounding circumstances; and the weight or effect to be given to these circumstances is not to be affected by any presumption for or against the validity of the restriction; if reasonable and just, the restriction will be sustained; if not, it will be held void.

Section 3. Agreements among competitors to restrict competition.

The common purpose or effect of agreements to regulate competition among concerns independently managed is to enhance profits by limiting, restricting, eliminating, or otherwise regulating competition normally prevailing between the parties. The agreement may be to fix prices, pool profits, divide territory, limit output, control supply, or in some way to regulate competition to the benefit of the parties. Such agreements may consist merely of an informal understanding or gentlemen's agreement under which performance depends entirely upon the good faith of the parties. In some cases the agreement may be more formal and may be set forth in writing. In some instances the parties may put themselves under bond not to violate the agreement. Any of these forms of agreement may be carried out through some form of organization or association among the parties.

Various reasons for holding these agreements and those discussed in section 4, to be void on grounds of public policy have been advanced by the courts. In the main they agree that the primary objection lies in the fact that they create conditions tending to concentrate control of the market in the hands of certain parties to the exclusion of others, at the same time subjecting the public to the possibility of the imposition of arbitrary and unreasonable prices, and to the disadvantages of possible deterioration in the quality and quantity of the supply of goods, when the spur of competition is removed.

[1] 27 Mich., 15 (1873).

Wherever any agreement between competitors[1] appears to involve an undue restriction of competition and therefore to be detrimental to the public interest the courts will refuse to aid in its enforce-

[1] *Agreements between noncompeting parties imposing restraints of trade.*—Arrangements between *noncompeting* parties as well as those between competing parties to "corner the market"; that is, to facilitate efforts to obtain control of the supply of a commodity in necessary or common use, in order to hold it for sale at arbitrarily enhanced prices, are also held to be void under the common law, as being against public policy. By controlling the supply the participants are in a position arbitrarily to dictate prices regardless of ordinary market conditions, thus creating substantially monopolistic conditions. In important respects the modern corner resembles the practices of forestalling, engrossing, and regrating, which were regarded as unlawful even before the time of Edward VI, in whose reign a statute was enacted for the purpose of defining such practices and fixing the punishment of offenders (5 and 6 Edward VI, chap. 14). The earlier statutes on the subject were repealed by statute, 12 George III, chap. 71 (1772); also 7 and 8 Vict., c. 24. Authorities differ as to whether the offenses of forestalling, engrossing, regrating, etc., were of common law or statutory origin. It seems that the enhancement of prices of articles of such necessary and common use as food was a crime at common law. (Coke's Inst., chap. 89. See citations in footnote, 2 Purdy's Beach on Private Corporations, pp. 1415–1416.) Even in the absence of statute, courts are inclined to regard those who participate in a corner as conspirators against the public welfare and will refuse to lend assistance in enforcing any part of the arrangement.

For decisions in cases involving attempts to corner the market, see Raymond *v.* Leavitt, 46 Mich., 447 (1881), and Samuels et al. *v.* Oliver et al., 130 Ill., 73 (1889).

In Pacific Factor Co. *v.* Adler (90 Cal., 110 (1890)), it appeared that in 1888 the defendant had entered into a contract with the plaintiff corporation whereby he agreed to give it the exclusive sale of all grain bags or burlaps (up to a specified number) which would be under his control prior to Jan. 1, 1889, and agreed to accept the average price received by the other party for all bags sold by him and to pay a commission on such sales. The defendant further agreed to pay the plaintiff as liquidated damages 3 cents for each bag or burlap which he refused or neglected to deliver on demand. In an action upon the contract to recover liquidated damages the defendant set up a special defense to the effect that the plaintiff, through its board of directors, devised a scheme to control the sale and supply of all or the greater portion of the grain bags and burlaps within the State for the purpose of increasing the price and of limiting the number of dealers from whom they could be obtained, and compelling the farmers to purchase said bags from the plaintiff at a price in excess of their real value; that the annual demand amounted to between 32,000,000 and 35,000,000 bags; that the plaintiff calculated that the quantity of bags, etc., within the State and which were to arrive prior to Jan. 1, 1889, would amount to 42,000,000 bags; that in pursuance of its scheme the plaintiff entered into contracts with other holders and owners of grain bags and burlaps in all respects similar to the contract made with the defendant; that the quantity of bags, etc., covered by all the plaintiff's contracts aggregated approximately 30,000,000; and that all said contracts, including the contract with the defendant, were contrary to public policy and void. The court held that, standing alone, the contract must be considered good, no illegal object or transgression of the law appearing and no public interest being injuriously affected, but that if it be shown that such contract formed part of a scheme to remove all competition and thereby compel consumers to purchase at excessive prices, the contract would be held void as contrary to public policy and would not be enforced.

The decision in Pacific Factor Co. *v.* Adler should be compared with that in Chappel *v.* Brockway, mentioned in the footnote on p. 35, and with Van Marter *v.* Babcock (23 Barbour, 633 (1857)), earlier New York cases. In the latter case the court was of the opinion that it would be too much to hold a contract illegal merely upon an inference that it was part of a larger scheme to control the market. In this case it appeared that a written contract had been entered into between the plaintiff and the defendants, by which the former agreed to sell to the latter all the mint oil which should be produced upon 23 acres of peppermint then growing, as well as all the oil of peppermint in the production of which the plaintiff should be in any way interested, for two years, and the defendant agreed to purchase the same at a specified price per pound. The plaintiff further agreed to discontinue his interest in the production of peppermint oil, with the above exception, for a period of two years; that he would not distill for any other person, excepting those who had contracted with the defendants, nor sell, rent, or give away his distillery or the use of it for two years, and that no peppermint should be grown or oil distilled on his land for two years, excepting for the production of the oil called for by the contract. It was further provided that the contract should be void in case the growers did not generally enter into an agreement with the defendants. In an action

ment. In this connection, no broad principle of general application to all cases can be laid down. The common-law doctrine is that each case must be considered in the light of the precise circumstances involved, but that whenever the facts in a particular case make it clear that the agreement between two or more competing concerns tends to give an undue control over the market, such agreement will be held unlawful and unenforceable.

CONTROL OF SUPPLY.—The application of the principle stated in the preceding paragraph is illustrated in Arnot *v.* The Pittston & Elmira Coal Co.[1] In that case it appeared that the plaintiff was the assignee of the Butler Colliery Co., a Pennsylvania corporation, engaged in mining and selling coal at Pittston, Pa. The defendant was also a Pennsylvania corporation, engaged in the same business, having a coal depot at Elmira, N. Y. For the purpose of controlling the shipment and supply, maintaining unnatural prices, and preventing competition in the sale of coal at Elmira a contract was entered into whereby the defendant agreed that it would take all the coal which the Butler company should desire to send north of the State line, not exceeding 2,000 tons per month, at the regular market price established by the Wyoming Coal Exchange less a specified commission, and the Butler company agreed that it would not sell coal to any party other than the defendant to come north of the State line during the continuance of the agreement. The product of the Butler company's mines was largely in excess of 2,000 tons per month. The defendant, without binding itself to take the whole output, endeavored by this agreement to keep all of the coal of the Butler company out of the market except the limited amount agreed upon, and thus to enhance the price of that commodity. Coal was delivered pursuant to the above contract for one month, but the Butler company refused to make further deliveries, and made sales to other parties north of the stipulated line. Action was begun by the assignee of the Butler Colliery Co. to recover the price of coal delivered. The court held that the arrangement to effect the objects purposed was inimical to the public interest, that all contracts designed to

against the defendants for a breach of this contract in refusing to receive and pay for oil, the court held that the agreement was not illegal and void as being in restraint of trade, or against public policy, or under the statute against conspiracies to restrain trade and commerce, or as being part of a scheme for monopolizing the trade in peppermint oil. In stating the reasons for its decision the court said:

"There is no foundation for the position now taken, that the contract was by its terms and under the proof, part of a scheme for monopolizing the trade in peppermint oil, and was illegal and void under the statute against conspiracies to restrain trade and commerce. All there is in the contract to afford any color for this objection is a provision at the close of it declaring the contract void unless the growers generally enter into an agreement with the defendants; but it is silent as to what agreement is intended or contemplated. It would be too much to hold the contract illegal upon an inference merely that the contract with the growers was to be of an illegal tendency."

[1] 68 N. Y., 558 (1877).

effect such an end were contrary to public policy and illegal, and that the plaintiff could not recover the price of coal so delivered.

An attempt to corner the available market supply of a particular commodity was involved in the case of the Santa Clara Valley Mill & Lumber Co. *v.* Hayes et al.[1] and also in India Bagging Association *v.* B. Kock & Co.[2] In the former case it appeared that the plaintiff corporation and defendants, who were lumber manufacturers, had entered into a contract whereby the latter agreed to make and deliver to the former during the year 1881, 2,000,000 feet of lumber at $11 per thousand feet. Defendants agreed not to manufacture lumber to be sold during said period in four specified counties except under the contract and to pay plaintiff $20 per thousand feet for lumber sold to any other parties. The court found that the plaintiff owned three sawmills near Felton, Cal., and that various other parties were owners of similar mills in the vicinity; that for the purpose of limiting the supply of lumber and increasing the price thereof a plan was devised by which the plaintiff was to lease all the mills for the year 1881, where such leases could be obtained; and where that could not be done, to lease by contracts similar to the one entered into with defendants; that during 1881 plaintiff should shut down two of its own mills and as many of the leased mills as might seem necessary in order to limit the supply of lumber in the four counties named; that this scheme was carried out, including the contract with defendants as a part thereof; that the only object and consideration on the part of the plaintiff in entering into these contracts was to form a combination among the lumber manufacturers in the vicinity for the sole purpose of increasing the price of lumber, limiting the output, and giving the plaintiff the control of all lumber manufactured near Felton for the year 1881 and control of the supply for that year in the counties mentioned; that the direct effect of this was that there was no wholesale market for lumber at Felton, and that dealers could not purchase in any considerable quantity during 1881. In an action to recover damages for a breach of the contract it was held that the contract was contrary to public policy, and being indivisible was invalid in its entirety. The court expressed its opinion in part as follows:

> With the results naturally flowing from the laws of demand and supply, the courts have nothing to do, but when agreements are resorted to for the purpose of taking trade out of the realm of competition, and thereby enhancing or depressing prices of commodities, the courts can not be successfully invoked, and their execution will be left to the volition of the parties thereto.

In the Louisiana case mentioned above, the facts were as follows: Eight firms had formed an association for the sale of India bagging, binding themselves for a term of three months not to sell any bag-

[1] 76 Cal., 387 (1888). [2] 14 La. Ann., 168 (1859).

ging, nor to offer to sell any, except with the consent of the majority, under a penalty of $10 for every bale so sold or offered. The bagging did not cease to be the property of the individual members. Suit was brought by the manager of the association against one of the members to recover a penalty of $7,400 for having sold 740 bales in violation of the agreement. The court held that the agreement was palpably and unequivocally a combination in restraint of trade to enhance the price of an article of primary necessity to cotton planters. The suit was dismissed, the court citing various common and civil law authorities holding that such combinations are contrary to public order and unenforceable in a court of justice.

An attempt to limit production by agreement was involved in Oliver et al. *v.* Gilmore,[1] where the plaintiffs, as party of the first part, agreed not to operate their plant for five years for the manufacture of strap and T hinges. In consideration thereof eight other firms or corporations in various States, as parties of the second part, severally agreed to pay monthly to the party of the first part a sum equal to 3½ per cent of the net sales of strap and T hinges sold by the several parties of the second part. It was provided that the sales should be reported and remittances made to the Wheeling Hinge Co.; that upon the failure of any of the parties to make such report or remittance notice should be given to each of the said parties, and if within 30 days the terms of the agreement were not complied with by the firm in default or by the Association of Strap and T Hinge Manufacturers the agreement should, at the option of the first party, be no longer in force. It was also agreed that if any one of the parties of the second part should in any way increase facilities for the manufacture of such hinges the agreement should be void. The plaintiffs sued to recover (1) an amount alleged to be due under this agreement and (2) damages for an alleged breach by the defendant in increasing his facilities for the manufacture of hinges. The court held that in view of the fact that by this contract the plaintiffs stipulated to shut down their works, at least so far as strap and T hinges were concerned, for the period of five years, for no consideration except a pecuniary one and without a lawful equivalent with reference to the continuance of manufacturing or its development in other directions, and also in view of the stipulation that the contract should be void if the other parties increased their existing facilities, the demurrer should be sustained as to both counts, with leave to amend. In reaching the result the court said:

* * * It is not intended by this to say, whether or not in an emergency of an overstock, manufacturers or miners may stipulate for handling their works or mines in a specific manner, or for shutting them down in whole or in part, each

[1] 52 Fed., 562 (1892).

for such limited time as would ordinarily enable a congested market to relieve itself; but a contract extending over a period of five years, intended, like this at bar, for restricting production, and absolutely binding manufacturers and dealers, while still retaining their plants and establishments, to operate them in a particular way, or to shut them down in whole or in part, is such an incumbrance on the freedom of individual action, necessary to the public good, as to be invalid. * * *

DIVISION OF TERRITORY.—Restraint on competition by an agreement to divide territory has also been held invalid in a number of cases, among which may be mentioned Chicago Gas Light & Coke Co. *v.* People's Gas Light & Coke Co.,[1] Gibbs *v.* Baltimore Gas Co. of Baltimore,[2] and Charleston Natural Gas Co. *v.* Kanawha Natural Gas, Light & Fuel Co. et al.[3]

In the West Virginia case it appeared that the Charleston Natural Gas Co. had been supplying the city of Charleston with gas by a pipe line from Boone County. The supply being inadequate, it acquired a gas field in Roane County, intending to develop gas and pipe it to its city lines. The Kanawha Natural Gas, Light & Fuel Co., which had a gas field in Roane and Kanawha Counties, had laid a pipe line to Charleston and was about to lay pipes in the streets of that city. Under these circumstances the two companies entered into an agreement providing that the Charleston company should have the exclusive right to sell natural gas in a certain section comprising the main part of the city of Charleston and a large area besides, and that the Kanawha company should have a similar right in a large adjoining section. Each party agreed not to invade the other's territory nor permit others to do so under its franchise. The Charleston company agreed not to drill wells or acquire territory for gas purposes within the territory occupied by the Kanawha company and to take all its gas from the latter. Earnings were to be divided in certain proportions, and the agreement was to continue 20 years. Subsequently the Kanawha company agreed to transfer its assets, leases, and wells to the United States Gas Co. The Charleston company thereupon sought to enjoin the Kanawha company from transferring its property, particularly said gas property, to the United States company, to enjoin the Kanawha company from discontinuing business, and to enforce the agreement. The court held that the contract was contrary to public policy and void, as tending to stifle competition and create a monopoly. The court pointed out that—

The trouble is, the whole spirit, drift, object, effect of the contract promotes monopoly. It works a combine, a union against public policy. As an entirety it does so. Its warp and woof are made of monopoly. We are as a court asked to enforce a contract with these hurtful features and consequences inwoven in its frame. We can not do so consistently with law.

[1] 121 Ill., 530 (1887). [2] 130 U. S., 396 (1889). [3] 58 W. Va., 22 (1905).

POOLING ARRANGEMENTS.—Pooling arrangements among competitors for the division of their earnings have also been held unlawful in a number of cases. In Anderson *v.* Jett et al.,[1] the owners of competing steamboats entered into an agreement providing that in order to prevent the rivalry then existing and the consequent reduction of rates below a fair compensation each boat should thereafter share, in fixed proportions, in the net profits of both; that each boat should bear its own operating expenses; that if the owner of either boat should sell it with a view of going out of the trade notice should be given to the other party; and that the owner so selling should not reenter the trade within one year. One of the parties sold his boat with a view to going out of the trade, giving due notice of the fact, whereupon the other owner purchased another boat to take its place and was engaged in operating both when the owner who had sold his boat reentered the business within the period stipulated in the agreement. In an action to recover damages the court, in holding that the agreement was against public policy and void, said:

> The combination or agreement, whether or not in the particular instance it has the desired effect, is void. The vice is in the combination or agreement. The practical evil effect of the combination only demonstrates its character; but if its object is to prevent or impede free and fair competition in trade, and may, in fact, have that tendency, it is void as being against public policy.

The same principle was involved in other cases mentioned elsewhere in this chapter, in Texas & Pacific Railway Co. et al. *v.* Southern Pacific Railway Co.,[2] and Chicago, Milwaukee & St. Paul Railway Co. *v.* Wabash, St. Louis & Pacific Railway Co.[3]

PRICE FIXING BY ASSOCIATIONS OF COMPETITORS.—When a number of competing concerns desire to restrict competition among themselves they have often attempted to carry out their plans through an association formed for the purpose. The members of such an association enter into some form of agreement or understanding to work together to accomplish the desired ends. The legality of these efforts depends upon their character. The courts judge them primarily by their effect upon the public.

Stanton *v.* Allen[4] was a case of this sort. The proprietors of 35 separate transportation lines on the Erie and Oswego Canals had formed an association, the professed object of which was to establish fair and uniform rates and equalize the business among members. The articles provided that the parties should not be partners; that rates should be determined by a committee; that earnings should be pooled and divided in specified proportions; that none of the mem-

[1] 89 Ky., 375 (1889).
[2] 41 La. Ann., 970 (1889).
[3] 61 Fed., 993 (C. C. A., 1894).
[4] 5 Denio, 434 (1848). See also Hooker *v.* Vandewater, 4 Denio, 349.

bers could use their boats except in accordance with the agreement; that if anyone should dispose of any boat so that it might be used outside of the association it might be seized to secure a compliance with the articles; and that a like seizure might be made of the boat of any party neglecting to comply with the articles, or who should become interested in any boat not belonging to a member of the association. In order to exclude others from a share of the business each party was bound, if he should have more freight than he could carry, to offer it to some of the associates; and if they could not take it he was authorized to procure its transportation without limitation as to rates, and, after deducting expenses and an additional fixed percentage for risk, to turn in the balance to the common fund. Approximately 400 boats were controlled through this agreement. An action was brought against the defendant, a member of the association, as the maker of a note and acceptor of a bill of exchange, payable, in pursuance of the agreement, to the order of the agent of the association. The court held that the association had a tendency to diminish public revenue and was injurious to trade; that the articles contravened public policy, were injurious to the interests of the State, and were therefore void at common law; and that no action could be maintained on the bill and note, which had arisen out of a transaction contrary to law. In reaching this decision the court expressed its opinion as follows:

> As these canals are the property of the State, constructed at great expense, as facilities to trade and commerce, and to foster and encourage agriculture, and are at the same time a munificent source of revenue, whatever concerns their employment and usefulness deeply involves the interests of the whole State.

A similar result was reached in Sayre *v.* Louisville Union Benevolent Association.[1] The by-laws of the Louisville Union Benevolent Association excluded from membership any person who had not been a captain, owner, or part owner of a steamboat on the Mississippi or Ohio Rivers or tributaries, and declared that no member "shall go into any river or trade and work for less than the wages, nor take, bargain for, or carry any freight for less than the established rate in the trade." The by-laws also provided for fines, required members to pay certain monthly dues, and tonnage dues for each trip made, and made provision for the relief of sick members, etc. Sayre, a member of the association, was sued by it to recover tonnage and monthly dues, fines for not paying said dues, and a fine of $250 for carrying freight for less than the established rate. From a judgment for the plaintiff the defendant appealed. The court was of the opinion that the agreement that no one should carry freight for less than the rate fixed by the association, without reference to the question

[1] 62 Ky., 143 (1863).

whether the rate was reasonable or not, was illegal and void. The court held as follows:

> We find nothing in the charter from which it can be reasonably inferred that the Legislature meant to authorize such a combination. In our opinion, the by-law under which the fine of $250 was imposed upon Sayre was illegal and void, notwithstanding his assent thereto; but the association is entitled to a judgment for the residue of the money claimed in the petition.

A more recent case is that of More et al. *v.* Bennett et al., decided in 1892.[1] In that case the plaintiffs and defendants were stenographers and members of the Chicago Law Stenographers' Association, the constitution and by-laws of which, among other things, provided that any reputable stenographer engaged in law-reporting in Cook County should be eligible to membership; that the association might adopt a schedule of rates to be charged by members; that members should not underbid each other, but might cut rates against outsiders; and that members violating the rules should be subject to fine. The plaintiffs entered into a contract with the county to report and furnish transcripts of the proceedings in a certain trial, agreeing to do said work at as low a rate (it was claimed) as any reputable stenographer should in good faith bid for said work. The defendants endeavored to secure the work at less than the rates fixed by the association, and the plaintiff, having been required by the county to meet said bid, brought an action to recover damages resulting from the alleged breach of the rules and by-laws of the association. It was held that as one of the objects of the association, if not its leading object, was to control the prices to be charged by its members for stenographic work by restraining all competition between them, it was contrary to public policy, and the courts would refuse to lend their aid to the enforcement of such an agreement.

Another important case which should be mentioned in this connection is Emery et al. *v.* The Ohio Candle Co.,[2] where it appeared that in 1880 an association known as the Candle Manufacturers' Association, composed of manufacturers producing 95 per cent of the Star candles made in substantially all the territory east of the western boundary of Utah, was formed, to continue for six years. Its object was to increase the price and reduce the production of candles, and it was found as a fact to have had that effect. Members were required to pay into the treasury 2½ cents per pound on every pound of candles disposed of on their own account within the territory; none was bound to operate his factory, and, whether he did or not, he received his proportion of the profits of the pool, which was based upon the business done by him in previous years, thus making it to the interest of each member to operate his factory when prices were high and to remain idle when prices were low. The Ohio

[1] 140 Ill., 69 (1892). [2] 47 Ohio State, 320 (1890).

Candle Co. joined the association in 1883 and withdrew in 1884, and sued the members of the Candle Manufacturers' Association to recover profits claimed to be due under the contract, which were withheld on the ground that it had violated the agreement by withdrawing before the expiration of the life of the association. In dismissing the petition the court held that the objects of the association were contrary to public policy; that no recovery could be had without giving effect to the terms of the agreement; and that the suit could not be maintained.

The establishment of a schedule of minimum prices seems to have been the object of an agreement which was passed upon by the court in De Witt Wire-Cloth Co. *v.* New Jersey Wire-Cloth Co.[1] In that case the defendant pleaded in extinguishment of an admitted cause of action that an equivalent sum was due from the plaintiff by virtue of the following facts: That three corporations and two copartnerships engaged in the manufacture and sale of wire cloth entered into an agreement whereby, for the avowed object of "regulating the price" of the commodity, they constituted themselves an association, imposed upon themselves stipulated rates of charge, engaged that they would "sell no cloth at less than the prices set forth," and to insure obedience to this undertaking subjected themselves to a heavy penalty for its violation; that the plaintiff and defendant were parties to this agreement and association; that, pursuant to a provision in the agreement, defendant deposited $2,000 with a trust company, to be forfeited to the other members in case the defendant should, among other things, violate its obligation not to sell below the stipulated price; that the association had declared the $2,000 forfeited; and that of this sum the plaintiff had received and wrongfully retained $500, which the defendant claimed. On demurrer by the plaintiff, it was held that the inevitable effect of the agreement was to restrict competition and to arbitrarily enhance prices; that such a contract, being repugnant to public policy, was unlawful; and that, as the counterclaim demanded the repayment of money received under an illegal agreement, the court would not interpose for its restitution.

An agreement entered into by all the tobacco warehousemen in Cincinnati, providing for the regulation of competition, for the fixing of prices, for pooling part of the receipts by giving monthly certificates of indebtedness to pool trustees, and for establishing a guaranty fund from a part of the money so collected, was involved in Hoffman et al., trustees, *v.* Brooks et al.[2] Each party was liable to forfeit his interest in the fund and was subject to fine for a breach of the terms of the agreement, which was unlimited in duration, and

[1] 14 N. Y. Supp., 277 (1891).
[2] Superior Court of Cincinnati, 6 Ohio Decisions Reprint, 1215 (1884).

from which the parties could withdraw only by unanimous consent. Defendants gave certificates of indebtedness for some months, and then refused to do so longer. Plaintiffs, who were trustees of the pool, sued upon the certificates of indebtedness given, for an accounting and for the amount so found due the pool under said agreement. In sustaining the defendants' demurrer the court held that although some of the stipulations might be upheld, others were void as against public policy, and, being inseparable in this action, no recovery could be allowed.

COMMON MARKETING AGENCY.—The employment of a common marketing agency is one of the plans sometimes adopted by competing concerns to restrict competition, affording a means of control over prices and production. Each of the parties participating reserves full ownership, management, and control of his own business, except in respect to the particular matters for which the common agency is employed.

Agreements of this kind have been entered into in a number of instances by companies engaged in coal mining. Thus, in the case of the Morris Run Coal Co. *v.* Barclay Coal Co.,[1] five coal corporations of Pennsylvania entered into an agreement in New York to divide two coal regions of which they had the control and to appoint a committee to take charge of their interests, which was to decide all questions and appoint a general agent in New York, through whom the coal was to be delivered. Each corporation was to deliver its proportion at its own cost in the different markets at such times and to such persons as the committee might direct. The committee was to adjust prices, rates of freight, and enter into agreements with anthracite companies. The five companies were to sell their coal themselves only to the extent of their proportion and at prices adjusted by the committee, the agent being authorized to suspend shipments beyond such proportion. Prices were to be averaged and payments made to those in arrears by those in excess, and no party was to sell coal otherwise than agreed upon. In an action for debt based on transactions under the contract it was held that the contract was void, being in violation of a New York statute prohibiting conspiracies to commit any act injurious to trade or commerce, and also void under the common law, being in restraint of trade and against public policy.

A similar result was reached in two cases decided in West Virginia where agreements of this kind had been made by competing coal companies. In one of these cases, Slaughter *v.* Thacker Coal & Coke Co.,[2] it appeared that the Thacker Coal Co. was organized in 1895 for the sole purpose of acting as sales agent of three out of four incorporated coal companies which were operating in the Thacker

[1] 68 Pa. State, 173 (1871). [2] 55 W. Va., 642 (1904).

coal vein, the presidents of these companies being the principal stockholders in the new corporation. The fourth coal company refused to take part in its organization or to contract with it. The agent corporation entered into a contract with the Thacker Coal & Coke Co. whereby it agreed to sell for that company, for a period of five years, not less than 20,000 tons of coal each year, or, in default thereof, to pay said company 20 cents per ton for so much as it should fail to sell. Ten cents per ton was to be deducted as compensation. The Thacker Coal & Coke Co. covenanted to deliver to the agent company as much coal as it could sell, not exceeding 84,000 tons per annum, or, in default thereof, to pay 10 cents per ton for coal not delivered, as liquidated damages. Selling prices were fixed in the agreement, and were not to be departed from without the consent of all the producing companies. The new company had authority to select and appoint all subagents for the sale of said coal. In 1896 the Thacker Coal & Coke Co. refused to deliver any more coal under the contract. Subsequently a resolution was passed dissolving the agent corporation and a receiver appointed, with directions to sue the Thacker Coal & Coke Co. for damages on account of the breach of the contract. The court held that the contract was illegal and void, as against public policy, its tendency being to restrain trade and competition.

In Pocahontas Coke Co. *v.* Powhatan Coal Co.,[1] the other West Virginia case referred to, 20 separate and independent coke manufacturing and producing corporations operating in the same coal field, had entered into a contract (called "contract A"), the expressed purpose being "to improve conditions in the manufacture, inspection, and shipment of coke, and to regulate and to improve the quality of coke manufactured in the district mentioned." The parties agreed to organize the Pocahontas Coke Co., each to be entitled to one share in said company for every coke oven owned by such party. The surplus earnings were to be divided annually among the stockholders in proportion to the amount of coke furnished by them to the company. The parties were required to enter into an agreement with the new company (called "contract B"), which provided in substance for the appointment of the company as the sole sales agent of the producers. By this contract the company was only required to take such quantity of coke from the parties as railroad facilities should be furnished to transport, and as market conditions enabled it to dispose of at or above cost of production. It was further provided that if the company should be unable to take all the coke produced it should only be required to take from each party such proportion of the whole amount as the number of ovens owned by such party bore to the total

[1] 60 W. Va., 508 (1906).

number of ovens owned by all the parties. The company was to receive a commission of 5 cents per ton and guaranteed payment at the average price for all coke handled by it. The agreement was to continue in force three years and to be renewed for like periods unless terminated by notice. The Pocahontas Coke Co. sought to enjoin the Powhatan company from withdrawing from contract B. The injunction was awarded, and from an order overruling a motion to dissolve the same, the defendant appealed. The court held that the combination established by contracts A and B was in unreasonable restraint of trade and against public policy; that when all the powers of the contracts were exercised the direct and necessary or natural effect was to restrain competition and control prices; and that such effect was not merely incidental, commensurate, or necessary to the protection of the parties in the enjoyment of the legitimate fruits of a lawful undertaking. It was held, further, that contract A, which constituted the basis of the suit, was void, because against public policy. In reaching this result, the court said:

> It is no defense to the illegality of a contract or combination which is in unreasonable restraint of trade to show that in the particular case a complete monopoly has not been formed, or that no control of prices has been exercised, or that prices have been lowered and not raised. * * * A contract which is charged to be in restraint of trade is not to be tested by what has been done under it, but by what may be done under it; not by its performance, but by its powers of performance when fully exercised.

Agreements among producers to employ common marketing arrangements were involved in Central Ohio Salt Co. *v.* Guthrie[1] and McBirney & Johnston White Lead Co. *v.* Consolidated White Lead Co.[2] In the first of these two cases, practically all the salt manufacturers in a large salt-producing territory had formed a voluntary association known as the Central Ohio Salt Co. for the express purpose of regulating the prices and sustaining the quality of salt. All salt made or owned by the members became the property of the company as soon as packed into barrels. Members were bound to sell only at retail, and then only to actual consumers at the place of manufacture, and at prices fixed from time to time by the directors. The proceeds of sales were paid to members in proportion to the amount of salt received from each. Defendant for some time complied with the terms of the agreement but subsequently refused to deliver to the company certain salt manufactured by him. In an action by the association to obtain possession of this salt, the court, in holding that such agreement was in restraint of trade and void as against public policy, said:

> The clear tendency of such an agreement is to establish a monopoly, and to destroy competition in trade, and for that reason, on grounds of public policy,

[1] 35 Ohio St., 666 (1880). [2] 8 Ohio Decisions reprint, 762 (1883).

courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public. * * * We think that the provision that "the manner and time of receiving and distributing salt shall be under the control of the directory" confers upon the company ample power to embarrass the freedom of the members as to the quantity of salt which they might wish to manufacture. There is no agreement that the company will receive all the salt manufactured and at the time when it may be ready for sale. On the whole case, we are clearly of the opinion that this agreement is void, as against public policy.

In the White Lead case, decided in the superior court of Cincinnati in 1883, it was shown that the manufacturers of white lead in the United States west of Buffalo had formed a corporation in which each was to have a certain amount of stock, and agreed that each member should be entitled to manufacture a certain amount of white lead proportionate to the amount of stock held by him, and no more; that they should sell at prices fixed by the corporation; that members failing to sell as much as they were entitled to should have the right to turn the surplus over to the corporation for the average price that they received from others, and that members disposing of more than their allotted proportion should receive from the corporation the amount turned in by the unsuccessful dealers. The plan was to be carried out by means of contracts with members of the corporation similar to the one upon which this action was brought, which, upon its face, was merely a provision between the plaintiff and the defendant as to the price to be obtained for lead turned in. In an action to recover a balance alleged to be due on account, the court found that the scheme was entered into for the purpose of controlling and restricting the manufacture and production of white lead and controlling the prices so that they should not fall below a certain figure, and held that the contract, being an essential part of an unlawful scheme, could not be enforced.

In Craft et al. *v.* McConoughy,[1] five competing grain dealers entered into an agreement "for the purpose of systematically pursuing the grain trade in Rochelle and for mutual protection against losses." It was provided in substance that the several grain houses should be put into the business, each firm receiving a specified number of shares; that each firm should conduct its own business as heretofore, keep its own accounts, pay its own expenses, ship its own grain, and furnish its own funds; that reports of all grain handled should be made to a general bookkeeper; that the account of each individual should be balanced monthly, showing the profit or loss, which was to be divided pro rata, according to the number

[1] 79 Ill., 346 (1875).

of shares held by each; and that prices and grades should be fixed from time to time. The combination purchased or leased all the warehouses in the city and every lot suitable for the erection of such buildings. The price to be paid for grain and the rates for storage and shipment were fixed at secret meetings. The parties were held out to the public as competitors. Following the execution of the agreement one of the parties died, and his son, the complainant, who claimed to have taken his place under the contract by mutual consent, brought a bill in equity for an accounting and distribution of the profits of the alleged partnership. The court held that the contract was in restraint of trade, unreasonable, oppressive, and injurious to the public, and that a court of equity would not lend its aid in the division of the profits of the illegal transaction. In its opinion the court said:

> While these parties were in business, in competition with each other, they had the undoubted right to establish their own rates for grain stored and commissions for shipment and sale. They could pay as high or low a price for grain as they saw proper and as they could make contracts with the producer. So long as competition was free, the interest of the public was safe. The laws of trade in connection with the rigor of competition was all the guaranty the public required; but the secret combination created by the contract destroyed all competition and created a monopoly against which the public interest had no protection.

In Fairbanks *v.* Leary,[1] the facts were as follows: Five individuals had entered into a copartnership agreement wherein each agreed not to transact on his individual account, within 20 miles of the place in which such partnership was to operate, the kind of business for the transaction of which it was created, namely, handling produce, live stock, wool, coal, lime, salt, hides, etc. Other provisions related to the conduct of the business, payment of expenses, division of profits, etc. It was alleged that the parties operated independently and in the same manner as they had theretofore done and as though the partnership did not exist, but adjusted their business transactions as provided in the agreement. The arrangement was discontinued by mutual consent. Plaintiffs subsequently sought an accounting for money belonging to the firm, alleged to have been received by defendant, who resisted payment, claiming that the agreement was void as it operated in unreasonable restraint of trade; that by prohibiting the transaction of business by the partners individually it tended to create a monopoly and to reduce prices paid for produce; that it was a conspiracy to maintain a false appearance of competition, while in reality the members of the firm were laboring for the common interest, seeking to depress the market; that the agreement was therefore void; and that the plaintiffs, as parties to an illegal contract, were not entitled to the aid of a

[1] 40 Wis., 637 (1876).

court of equity. The court held that the clause wherein each partner had agreed not to transact the same kind of business on his individual account within 20 miles was unobjectionable; but if the copartnership was in fact formed (though not so expressed in the articles) to prevent competition in the markets in which the firm was to operate, that the deception upon the public involved in keeping the existence of the agreement secret and the maintenance of an appearance of competition, tainted the agreement, rendering it void. The court was of the opinion, however, that the averment that the firms operated independently and in the same manner as they had theretofore done, etc., would not of itself show any secrecy as to the true relations of the parties and would not make the complaint bad on demurrer.

The common-law principle against agreements in restraint of trade has also been held applicable to agreements among competing buyers in Chapin *v.* Brown Bros.[1] and in the People *v.* Milk Exchange.[2]

In Chapin *v.* Brown Bros. it appeared that all the grocery men at Storm Lake, Iowa, decided that the handling of butter was burdensome and entered into an agreement with D. & E. Chapin, the plaintiffs (who were to establish a store in Storm Lake to sell butter), not to buy any butter nor to take any in trade, except for the use of their families; provided the grocery men should not be prevented from buying butter to retail from any regular butter buyer who bought for cash all his butter in Storm Lake. In refusing to enforce the agreement, the court said it was invalid, lacking consideration, and that—

> It plainly tends to monopolize the butter trade at Storm Lake, and destroy competition in that business. It is not necessary that the enforcement of the agreement would actually create a monopoly in order to render it invalid, and surely where all the dealers in a commodity in a certain locality agree to quit the business, and the plaintiffs are installed as the only dealers in that line, the tendency is, for a time at least, to destroy competition, and leave the plaintiffs as the only dealers in that species of property in that locality.

In People *v.* Milk Exchange, the milk exchange when organized, or shortly thereafter, had ninety-odd stockholders, a large majority of whom were milk dealers in the city of New York or creamery or milk-commission men doing business in that vicinity. A by-law provided that the board of directors should have power to fix the market price at which milk should be purchased by the stockholders. The directors accordingly fixed the price of milk, and the prices so fixed largely controlled the market in and about New York and the milk-producing territory contiguous thereto. An action was brought by the attorney general to dissolve the corporation and vacate its charter. The court, among other things, held that the facts sup-

[1] 83 Iowa, 156 (1891). [2] 145 N. Y., 267 (1895).

ported a verdict or finding that the combination being inimical to trade and commerce was unlawful. In reaching this decision the court said:

> It may be claimed that the purpose of the combination was to reduce the price of milk, and that it being an article of food such reduction was not against public policy. But the price was fixed for the benefit of the dealers, and not the consumers, and the logical effect upon the trade of so fixing the price by the combination was to paralyze the production and limit the supply, and thus leave the dealers in a position to control the market, and at their option to enhance the price to be paid by the consumers. This brings the case within the condemnation of the authorities to which we have referred.

In National Bank of the Metropolis *v.* Sprague et al.,[1] it was decided that where there is no agreement not to compete, it is not unlawful for persons to join to make a purchase for their common benefit. In that case, upon a petition of the complainant, a judgment creditor of the defendant, Sprague, to set aside a sale of valuable real estate sold by a master under a decree of foreclosure, it appeared that the bidder to whom the property was struck off was acting as agent of the complainant and was unable to comply with the terms of the sale. The master thereupon required a deposit of $5,000 before bids would be received and again offered the property, which was finally sold to an agent of a large number of creditors. It did not appear that any one of these creditors who agreed to purchase for their common benefit would have been willing or able to purchase on his own account. One of the grounds on which the complainant urged that the sale be set aside was that the combination of creditors to purchase it together was against the policy of the law as preventing competition. The court held that it was not unlawful for persons to join to make a purchase for their common benefit without an agreement not to compete. In reaching this decision the court expressed its opinion as follows:

> There is no doubt that it is illegal for two purchasers, or intended purchasers at an auction sale, to combine not to bid against each other, and to divide in any way the profits of purchases made under such an agreement. But all the authorities and decisions in this matter which have been brought to my notice are confined to cases in which there is an agreement between the parties not to bid or enter into competition to bid against each other, and where this agreement is the foundation of the combination to purchase for their common benefit. And the principle upon which the rule is based would apply only to such cases, and not to cases where parties joined to make a purchase for their common benefit without an agreement not to compete, although the effect of such joint purchase might be to prevent competition. * * * And it seems * * * that creditors in a case like this should be permitted to unite, because it is calculated to enhance the price, and not to injure the sale.

Agreements regulating competition among those bidding for furnishing the public with goods, supplies, or services, or for the services

[1] 20 N. J. Equity, 159 (1869).

of the inmates of public institutions have also been passed upon by the courts.[1]

VALID RESTRICTIVE AGREEMENTS.—In certain cases restrictive agreements between competing parties have been upheld. Thus, in Long et al. *v.* Towl,[2] it appeared that the plaintiffs were in possession of a tract of land from which miners were engaged in taking lead ore under an agreement to sell such ore to plaintiffs. In violation of this agreement some of the miners sold some of the ore to the defendant. In settlement of litigation arising from this transaction defendant agreed that for ore taken from plaintiffs' land he would not thereafter pay a greater price than plaintiffs were paying for such ore, and that for ore taken from other lands he would not pay a greater price than the plaintiffs were paying for ore taken from their own. He agreed to sell exclusively to the plaintiffs all ore thereafter purchased by him at a price of $4 per 1,000 pounds more than plaintiffs were paying at the time to the miners on their own land. In a suit to recover liquidated damages for a breach of this agreement it was urged that the contract was in restraint of trade and void. The court was of the opinion, however, that such a contract, which did not prohibit the defendant from carrying on his business at any place he might choose, but only limited the manner of carrying it on by fixing the price at which he might buy and sell and the persons to whom he might sell, was not a restraint of trade.[3]

In Dolph *v.* Troy Laundry Machinery Co.,[4] it appeared that the two principal manufacturers of washing machines in the United States, in order to avoid competition and to secure better prices and larger profits, had agreed to divide profits. The agreement, which was to continue for five years, provided that the plaintiff was to deliver to the defendant a certain number of machines annually. The plaintiff had the option to manufacture all machines sold by both. The court held this agreement was valid and not against public policy. The opinion contained certain statements from which it seems that the court took a view as to the legality of such agreements differing in some respects from the view taken in other cases by other courts. In this case the court was of the opinion that—

> Assuming that, in entering into the contract, the parties contemplated that the defendant should cease manufacturing machines, and buy all its machines from the plaintiff, and that the only purpose in view was to promote the inter-

[1] Woodruff *v.* Berry, 40 Ark., 251 (1882); Atcheson *v.* Mallon, 43 N. Y., 147 (1870); Marsh *v.* Russell, 66 N. Y., 288 (1876); Gibbs *v.* Smith, 115 Mass., 592 (1874).

[2] 42 Mo., 545 (1868).

[3] Case decided on the ground that the dismissal of the original litigation formed no consideration for the promise that sum stipulated was not liquidated damages, but a penalty merely.

[4] 28 Fed., 553 (1886).

ests of the parties, and enable them to obtain from customers higher prices for the machines, it is not obvious how such a contract contravenes any principle of public policy. Washing-machines, although articles of convenience, are not articles of necessity. The scheme of the parties did not contemplate suppressing the manufacture or sale of machines by others. * * * It is quite legitimate for any trader to obtain the highest price he can for any commodity in which he deals. It is equally legitimate for two rival manufacturers or traders to agree upon a scale of selling prices for their goods, and a division of their profits. It is not obnoxious to good morals, or to the rights of the public, that two rival traders agree to consolidate their concerns, and that one shall discontinue business, and become a partner with the other, for a special term. It may happen, as a result of such an arrangement, that the public have to pay more for the commodities in which the parties deal, but the public are not obliged to buy of them. Certainly, the public have no right to complain, so long as the transaction falls short of a conspiracy between the parties to control prices by creating a monopoly. * * *

The decision in Central Shade Roller Co. *v.* Cushman[1] also seems somewhat at variance with most of the decisions in cases of this kind, although it should be noted that the agreement related to a patented device and also that the court expressly pointed out that the article affected by the agreement was not an article of prime or public necessity. In this case it appeared that three manufacturers of a certain kind of curtain fixture, under different letters patent owned by them severally, in order to avoid competition, had organized the Central Shade Roller Co., a corporation in which they were the only stockholders, and an agreement was entered into between the corporation and the manufacturers, providing that the corporation was to take the output of each manufacturer; that the corporation was to employ no salesmen, but the manufacturers were to act as its selling agents and receive a commission upon their sales; that the prices for rollers of the same grade, made by the different parties should be the same according to a schedule contained in the contract, and that when any party should establish an agency in any city or town for the sale of a roller made exclusively for that purpose, no other party should take orders for the same roller in the same place. During the term agreed upon the manufacturers were not to sell or dispose of any of their letters patent except upon such terms that a transferee should be bound by this agreement, nor were they to dispose of their stock in the corporation without the written consent of a majority of the stockholders. The purpose of the agreement, as stated by the complainant, was to prevent competition in the sale of shade rollers, to secure larger profits by preventing an unprofitable reduction of prices for the same, and so to merge the business of each of said parties that each should obtain an equitable share of the profits of each

[1] 143 Mass., 353 (1887).

of the others and that there should be a substantial identity of interests in said business. The corporation filed a bill alleging a breach of the agreement on the part of the defendant, prayed for an accounting and for an injunction to restrain the defendant from selling in violation of the terms of the agreement. The case was heard on bill and demurrer, and the bill was dismissed. On appeal by the plaintiff the court held that the agreement was not invalid as in restraint of trade or against public policy, being apparently beneficial to the parties to the combination and not necessarily injurious to the public, as the agreement did not relate to an article of prime necessity, to a staple of commerce, or to merchandise to be bought and sold on the market.[1]

A restrictive agreement among quarrymen was upheld by the court in Skrainka *v.* Scharringhausen,[2] under the following circumstances: It appeared that some 24 owners and operators of stone quarries in St. Louis, for the purpose of securing "a fair, proportionate sale of the produce of all quarries at uniform prices and living rates," had agreed that for a period of six months they would not sell any stone except as set forth in the agreement. They agreed, further, to appoint an exclusive agent, who was to apportion the output among the various quarries and sell at stipulated prices. A penalty was fixed for the violation of the agreement. Plaintiff was appointed trustee to sue for the damages, and brought this action for violation of the agreement. Defendant contended that the agreement was against public policy, in restraint of trade, and unreasonable. The court in holding the agreement valid, as being not necessarily in restraint of trade, said:

The agreement is amongst the quarrymen of one district of one city, and it does not appear that it embraces all of them. There is no evidence that it

[1] In this connection, the court, in United States *v.* Addyston Pipe & Steel Co. (85 Fed., 271), in referring to the Shade roller case, said:

"Two other cases deserve mention here. They are Roller Co. *v.* Cushman, 143 Mass., 353, 9 N. E., 629, and Gloucester Isinglass & Glue Co. *v.* Russia Cement Co., 154 Mass., 92, 27 N. E., 1005. In these cases it was held that contracts in restraint of trade are not invalid if they affect trade in articles which, though useful and convenient, are not articles of prime or public necessity, and therefore contracts between dealers made to secure complete control of the manufacture and sale of such articles were supported. In the first case the article involved was a fastening of a certain shade roller, and in the other was glue made from fish skins. We think the cases hereafter cited show that the common law rule against restraint of trade extends to all articles of merchandise, and that the introduction of such a distinction only furnishes another opportunity for courts to give effect to the varying economical opinions of its individual members. It might be difficult to say why it was any more important to prevent restraints in beer, mineral water, leather cloth, and wire cloth than of trade in shades and glue. However this may be, the cases do not touch the case at bar, because the same court in Telegraph Co. *v.* Crane, 160 Mass. 50, 35 N. E., 98, held that fire-alarm telegraph instruments were articles of sufficient public necessity to render unreasonable restraints of trade in them void, and certainly such articles are not more necessary for public use than water, gas, and sewer pipe."

[2] 8 Mo. App., 523 (1880).

works any public mischief, and the contract is not of such a nature that it is apparent from its terms that it tends to deprive men of employment, unduly raise prices, cause a monopoly, or put an end to competition. It is limited both as to time and place, and we know of no case in recent times in which a contract such as the one before us has been declared illegal.

In the People ex rel. Pinckney *v.* New York Board of Fire Underwriters[1] and Matthews et al. *v.* Associated Press of the State of New York,[2] the courts held that it was within the power of the respective associations to adopt and enforce a by-law imposing a certain restraint upon its members, providing the restraint was reasonable and appropriate under the circumstances. In the first of these cases, however, it should be noted that the defendant board had been incorporated by an act of the legislature, one of its declared purposes being to "establish and maintain uniformity" among its members in "policies or contracts of insurance," and power had been conferred "to make all needful by-laws not contrary to the provisions of the act or to the constitution and laws of this State or of the United States." The court held that a by-law binding members to uniformity in rates of insurance came within the powers conferred; that as the legislature conferred the power to pass the by-law, it was not in conflict but in harmony with public policy, nor was it open to the objection that it was in restraint of trade; that, as the by-law under which respondents acted was reasonable and within their corporate powers, the relator was liable to expulsion.

In Matthews et al. *v.* Associated Press, the other case referred to, it appeared that the plaintiffs, who were also members of the United Press Association, had procured an injunction against the Associated Press, etc., restraining it from suspending them from any of the rights or privileges in the Associated Press and from withholding from the plaintiffs (who were publishers of newspapers at Buffalo) the regular news and reports furnished by the association to its members, on account of any alleged violation by the plaintiffs of a by-law of the association which provided in part that "no member of this association shall receive or publish the regular news dispatches of any other news association covering a like territory and organized for a like purpose with this association." The court held that this by-law was valid and enforceable; that it did not improperly tend to restrain trade (assuming the business of collecting and distributing news would come within the definition of a trade); and that it was a natural and reasonable restraint upon the members of the association appropriately regulating their conduct as mem-

[1] 54 Howard's Prac. (N. Y.), 240 (1875).
[2] 136 N. Y., 333 (1893).

bers thereof with respect to the business which the association was organized to transact.[1]

Section 4. Agreements among competing interests to consolidate under common ownership or control.

Even before it had become plain that under ordinary circumstances the courts would not uphold a direct agreement among competitors where it appeared that the object or effect was to limit competition, competing concerns sought other methods to accomplish substantially the same result by the more formal plan of combining under common control or ownership. Regarding this as a means of securing control of the market, the courts in general have taken no more favorable a view of this plan than of the direct agreements to limit competition discussed in the preceding section. The same evil is present, namely, the attempt to restrain trade and to control the market primarily for the benefit of the combining interests. In a number of cases involving attempts of this kind, the courts have refused to recognize the validity of agreements entered into for the acquisition of the shares of one corporation by another; agreements for the the surrender of the control of competing concerns to a single

[1] The decision in this case should be compared with that in Inter-Ocean Publishing Co. *v.* Associated Press, decided by the Supreme Court of Illinois in 1900 (56 N. E. Rep., 822), where an opposite result was reached. By a long line of common-law decisions, railroads, other common carriers, and certain other businesses and callings which of necessity are carried on under conditions more or less monopolistic in character have been held to be subject to certain obligations not imposed on those who follow other occupations or trades. It is not within the scope of the present report to discuss the character of these obligations in detail. Besides the cases involving such obligations with respect to railroads, the following may be cited: Munn *v.* Illinois, 94 U. S., 113 (1876); West Virginia Transportation Co. *v.* Ohio River Pipe Line Co. et al., 22 W. Va., 600 (1883); People ex rel. Postal Telegraph-Cable Co. *v.* Hudson River Telephone Co., 19 Abbott's New Cases (N. Y.), 466 (1887); New York and Chicago Grain and Stock Exchange *v.* Board of Trade of City of Chicago et al., 127 Ill., 153 (1886); State *v.* Portland Natural Gas & Oil Co., 153 Ind., 483 (1899).

Grants of a monopolistic character by public authority also present a class of cases which should be mentioned here. When the object to be attained seems clearly to be in the public interest, legislative grants authorizing the exercise of special privileges by certain designated persons, to the exclusion of others, have been upheld by the courts in a number of cases. Such grants, however, are subject to strict interpretation by the courts, and any ambiguity is construed in favor of the public and against the grantee. The power of municipal corporations to grant special and exclusive privileges depends upon the power conferred upon the municipal corporation and the powers incident thereto.

Among cases of the class mentioned in the preceding paragraph may be cited: Enfield Toll Bridge Co. *v.* Hartford & New Haven R. R. Co., 17 Conn., 40 (1845); Broadway & Locust Point Ferry Co. *v.* Hankey, 31 Md., 346 (1869); Slaughterhouse cases, 83 U. S., 36 (1872); Gaines et al. *v.* Coates, 51 Miss., 335 (1875); Burlington & Hudson County Ferry Co. *v.* Davis, 78 Iowa, 133 (1878); State *v.* Milwaukee Gas Light Co., 29 Wis., 454 (1872); McRae *v.* Wilmington & Raleigh R. R. Co., 47 N. C., 186 (1855); Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn., 19 (1856); Caldwell *v.* City of Alton, 37 Ill., 416 (1864); City of Chicago *v.* Rumpff et al., 45 Ill., 90 (1867); City of Bloomington *v.* Wahl, 46 Ill., 489 (1868); Tugman *v.* City of Chicago, 78 Ill., 405 (1875); Gale *v.* Village of Kalamazoo, 23 Mich., 344 (1871); and Logan & Sons *v.* Pyne, 43 Iowa, 542 (1876).

common trustee or board of trustees;[1] or for the merger of various competing properties by transfer to another corporation formed for the purpose of taking them over and operating them in the interest of all.

ACQUISITION BY CORPORATION OF SHARES IN ANOTHER CORPORATION.—A corporation has sometimes attempted to eliminate or control the competition of some other corporation or corporations by acquiring shares of the latter's capital stock.[2] In a number of cases of this sort that have been passed upon by the courts it has not been necessary to invoke the principle against agreements in restraint of trade. In such cases the courts have deemed it sufficient to hold such acquisitions unlawful as a violation of a principle of the law of corporations which forbids a corporation from exercising any power or authority not expressly conferred upon it or necessarily incidental thereto. Under this principle of corporation law, it is held that in the absence of express legislative authority every corporation is prohibited from acquiring or holding stock in another corporation or from surrendering control of its own affairs to others. Such an act is considered ultra vires as foreign to the purpose for which the corporation was created and, therefore, as opposed to public policy. In holding such acquisitions unlawful, however, the courts have often pointed out that the agreement involved also a violation of the rule against agreements in restraint of trade.

In Franklin Bank of Cincinnati *v.* Commercial Bank of Cincinnati[3] it was held that one corporation can not become the owner of any portion of the capital stock of another unless authority is clearly conferred by statute. In this case the plaintiff and the defendant were banking corporations, an action having been brought upon the refusal of the defendant to transfer to the plaintiff certain shares of stock of the defendant company, owned by its president, which had been pledged with the plaintiff by the owner to

[1] In connection with the class of contracts discussed in this section, mention should also be made of restrictions in agreements whereby the various stockholders in a single corporation transfer their shares to trustees under a so-called voting-trust agreement. While such agreements may be valid as a principle of corporation law, they may be rendered void by the character of restrictions imposed therein upon the right of the stockholders to dispose of their interests and the privileges incident thereto. See Moses *v.* Scott, 84 Ala., 608 (1887).

[2] For the same purpose, one corporation has sometimes leased the property of another. Thus, in Thomas *v.* Railroad Co. (101 U. S., 71), decided in 1879, the United States Supreme Court rested its decision upon the ground that the lease by a railroad company, without charter authority, of its road, buildings, and rolling stock for a term of 20 years was an ultra vires act, against public policy, and void. In this connection the court said:

"* * * where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy. * * *"

[3] 36 Ohio St., 350 (1881).

secure a loan on his individual account. The court held that the right to deal in shares of stock in other corporations was not only not found among the enumerated powers conferred upon banks by law but that such power was denied and its exercise expressly prohibited, hence the refusal of the defendant to permit the transfer violated no right of the plaintiff and created no liability on the part of the defendant.

Both the ultra vires principle and that against contracts in restraint of trade were held to be involved in Central Railroad Co. et al *v.* Collins et al.[1] In that case the complainant charged in substance that the Central Railroad & Banking Co. (chartered to build and maintain a road from Savannah to Macon) and the Southwestern Railroad Co. (chartered to build a road from Savannah to Bainbridge) were about to purchase from the city of Savannah certain stock, including 12,383 shares of the Atlantic & Gulf Railroad Co. The complainants alleged, among other things, that such purpose was in violation of the charters of the defendant companies; that it was not necessary to the purpose of their organization or for the legitimate execution of that purpose; that one of the purposes was to free the Southwestern Railroad from the competition of the Atlantic & Gulf Railroad; that the purchase was illegal because of the intention with which it was made; that it was contrary to public policy, being injurious to the interests of the stockholders and the people. An injunction was granted and the defendants appealed. The defendants substantially admitted the charges, but sought to dissolve the injunction, contending as one ground of defense that the railroads had a right under their charters to make such a purchase. The court held, however, that a corporation has no powers except those expressly granted by its charter and those necessary to the declared objects of the grant; that the charter should be strictly construed; and that the capital stock, credit, and property of every kind must be used solely for the purposes and objects of the charter. It was held, further, that a corporation could not engage in any new and distinct enterprise involving new risks to its stockholders not fairly within the terms of the original grant; that the purchases of stock in another railroad with intent to hold it, and, as in this case, with intent to use the power thus acquired to secure an interest in the management of the road, came within these principles; that neither the Southwestern nor the Central Railroad Co. was authorized by charter to purchase the stock in question; and that a court of equity, at the instance of stockholders, would restrain such an act. In its opinion the court said in part:

* * * The admitted facts of this answer show that the very object of the contemplated purchase, the sole motive which prompts it, is to prevent the

[1] 40 Ga., 582 (1869).

ruinous competition which the Gulf road has already entered into for the freights of the Flint and Chattahoochee regions. Even a petty tradesman can not legally bind another not to carry on a particular business over any large extent of territory; and here is a contract, the object of which is unblushingly avowed to be to so get control of the Atlantic & Gulf Road, as that its present mode of carrying freights at low rates, shall cease, and the very object of the legislature in granting the charter, and becoming itself a large stockholder, be thwarted.[1]

TRUST AGREEMENTS.—As already mentioned (see p. 7), trust agreements were first used as a means of restricting or regulating competition about 1880. Under this plan, holders of the shares of the various participating corporations transferred their holdings to trustees, usually receiving in exchange certificates issued by the trustees. Under the trust agreement the trustees were empowered to control each corporation which became a party to the agreement.

One of the first cases to be decided involving an arrangement in the nature of a trust was Mallory *v.* Hanaur Oil Works.[2] While the court in this case referred to the agreement as tending to create a monopoly through a combination of corporations, the agreement was held unlawful because ultra vires. In this case four corporations engaged in manufacturing cottonseed oil agreed to select a committee composed of representatives from each corporation and to turn over to them the properties and machinery of each mill, to be managed and operated by the committee for the common benefit, the profits and losses to be shared in proportions agreed upon. In accordance with the agreement the several mills were turned over and operated by these managers under the name of the "Independent Cotton Seed Association," and a fifth corporation was subsequently admitted by consent. The directors of the Hanaur Oil Works, one of the contracting parties, passed a resolution declaring this contract void, as being ultra vires, and their president was directed to take possession of their mill. The Hanaur company sued out a writ of unlawful detainer, and from a judgment in its favor the defendant appealed. The court held that the agreement was a contract of partnership; that such a partnership contract was not within the express or implied powers of corporations organized under the incorporation act, but was ultra vires and void, and that the plaintiff was entitled to recover possession of its property. In this case the court remarked that—

We have not deemed it necessary to consider the question of the legality of such a combination of corporations as one tending to create a monopoly, for

[1] See also Hazelhurst et al. *v.* Savannah, Griffin & North Alabama Railroad Co. et al., 43 Ga., 13 (1871); Milburn et al. *v.* New York, Lake Erie & Western Railroad Co. et al., 64 Howard's Prac. (N. Y.), 20 (1882); Elkins *v.* Camden & Atlantic Railroad Co., 36 N. J. Eq., 5 (1882); and People ex rel. Peabody *v.* Chicago Gas Trust Co., 130 Ill., 268 (1889).

[2] 86 Tenn., 598 (1888).

the ground upon which we place the case needs no additional prop. The question of the validity of such an arrangement is a very grave one, but need not now be considered.

In the leading case of People *v.* North River Sugar Refining Co.[1] the lower court was of the opinion that the agreement which was involved violated both the ultra vires principle and that against monopolies. The State Court of Appeals, however, expressly decided the case on the ultra vires feature, referring to the monopolistic feature as shown below. The defendant company had been incorporated in New York in 1865 as a manufacturing corporation to refine and sell sugar, sirups, and molasses. In 1887 it became a party to the formation of an unincorporated company, known as the Sugar Refineries Co., in the nature of a partnership or association, with the object of bringing together various competing interests engaged in the manufacture, refining, and sale of sugar. The expressed purpose of the plan was to promote economy of administration and reduce the cost of refining; to give each refinery the benefit of all appliances and processes known or used by the others; to furnish protection against unlawful combinations of labor; and to oppose inducements to lower the standard of refined sugar. Each corporation becoming a party to the agreement was to maintain its separate organization and conduct its own business under control of the association through a board. The stock of each corporation was to be transferred to this board, and in its place shares were to be issued by the association and distributed to the stockholders in proportion to their previous holdings. Profits of the corporations were to be paid to the board, which was authorized to declare dividends therefrom. The board was authorized to transfer corporate stock to such persons as it might desire to qualify as directors or other officers of the corporations, which stock was to be held by them subject to the provisions of this agreement. All but six companies engaged in the business in the United States became parties to the agreement. The defendant became a party by the signature of its secretary, whose authority was subsequently revoked, but finally the stock was transferred to the board of the Sugar Refineries Co. and certificates of the latter were divided among the stockholders of the defendant company. The State brought an action to vacate the charter.

The court held that the defendant by making itself a party to the association had renounced and abandoned its own duties for the transaction and management of its own business and placed its interests and affairs under the direction and control of a board which legally should have no power over it, and rendered itself

[1] 54 Hun, 354 (1889).

liable to the judgment which has been recovered; that the defendant had placed itself in complete subordination to another and different organization, to be used for an unlawful purpose, detrimental and injurious to the public; that it had become a party to a combination designed, in part at least, to create a monopoly and exact from the public prices which could not otherwise be obtained; that this was a subversion of the object for which the company was created, and authorized the action to vacate its charter.

The court of appeals[1] in affirming this judgment expressly rested its decision upon the ground that the corporation had violated its charter and failed in the performance of its corporate duties. In this connection the court said:

* * * Having reached that result, it becomes needless to advance into the wider discussion over monopolies and competition and restraint of trade and the problems of political economy. * * *

The decision in the North River Sugar case was followed by another decision of great importance, namely, that in the case of the State of Ohio *v.* Standard Oil Co.[2] In the latter case it appeared that most of the owners of shares in the defendant company and of a number of other oil companies had transferred their stock to trustees in exchange for trust certificates, common control of each of the various companies participating in the agreement being effected by the trustees' action in electing themselves directors of each of the companies. The court held that an unlawful combination had been effected and ordered a forfeiture of the charter of the defendant corporation. In reaching this decision the court said:

Under the agreement all but seven of the shares of the capital stock of the company have been transferred by the real owners to the trustees of the trust, who hold them in trust for such owners; and being enjoined by the terms of the agreement to endeavor to have "the affairs" of the several companies managed in a manner most conducive to the interest of the holders of the trust certificates issued by the trust, have the right, in virtue of their apparent legal ownership and by the terms of the agreement, to select such directors of the company as they may see fit, nay more, may in fact select themselves. The law requires that a corporation should be controlled and managed by its directors in the interest of its own stockholders, and conformable to the purpose for which it was created by the laws of the State. By this agreement, indirectly it is true, but none the less effectually, the defendant is controlled and managed by the Standard Oil trust, an association with its principal place of business in New York City, and organized for a purpose contrary to the policy of our laws. Its object was to establish a virtual monopoly of the business of producing petroleum, and of manufacturing, refining and dealing in it and all its products, throughout the entire country, and by which it might not merely control the production, but the price at its pleasure. All such associations are contrary to the policy of our State and void.

[1] 121 N. Y., 582 (1890). [2] 49 Ohio St., 137 (1892).

Referring to the control of prices the court said:

Much has been said in favor of the objects of the Standard Oil Trust, and what it has accomplished. It may be true that it has improved the quality and cheapened the costs of petroleum and its products to the consumer. But such is not one of the usual or general results of a monopoly; and it is the policy of the law to regard, not what may, but what usually, happens. Experience shows that it is not wise to trust human cupidity where it has the opportunity to aggrandize itself at the expense of others. The claim of having cheapened the price to the consumer is the usual pretext on which monopolies of this kind are defended, and is well answered in Richardson *v.* Buhl, 77 Mich., 632. After commenting on the tendency of the combination known as the "Diamond Match Company," to prevent competition and to control prices, Champlin, J., said: "It is no answer to say that this monopoly has in fact reduced the price of friction matches. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree." Monopolies have always been regarded as contrary to the spirit and policy of the common law. The objections are stated in the "Case on Monopolies," Darcy *v.* Allein, Coke's Reports, Part XI 84b. * * * A society in which a few men are the employers and the great body are merely employees or servants, is not the most desirable in a Republic; and it should be as much the policy of the laws to multiply the numbers engaged in independent pursuits or in the profits of production, as to cheapen the price to the consumer. Such policy would tend to an equality of fortunes among its citizens, thought to be so desirable in a Republic, and lessen the amount of pauperism and crime. * * * By the invariable laws of human nature, competition will be excluded and prices controlled in the interest of those connected with the combination or trust.

In the meantime two other cases had been decided, one in Nebraska and one in New York, in which the courts found it necessary to pass upon a trust agreement by which the control of various companies was combined. In the Nebraska case, State *v.* Nebraska Distilling Co.,[1] it appeared that the Distillers' & Cattle Feeders' Trust, an unincorporated association, had been formed in 1887 by owners of nine distilleries for the purpose of restricting output, regulating prices, and preventing competition. These objects were to be accomplished by securing control of as many distilleries as possible, the method being stated as follows:

An arrangement or agreement is made by which the company is to transfer its capital stock to the trustees of the Distillers' and Cattle Feeders' Trust, for which said trustees are to issue certificates of the trust. The real estate upon which the distillery is situated is deeded to some one member of the company as trustee for the stockholders, and the trustee then leases said real estate to the company for the term of 25 years. The capital stock of the company is canceled and new stock issued to said nine trustees of the trust, for which the trustees give the agreed amount of certificates of the trust. The board of directors of the company resign and a new board is elected, a majority of which are taken from the nine trustees of the trust. * * * The trustees of the trust have almost unlimited power and control over all distilleries that enter it. They can limit their production or suspend their operation altogether. * * *

[1] 29 Nebr., 700 (1890).

The trustees confine the production of the distilleries under their control to the large houses situated in favorable localities, which can be run at less expense than small houses located in unfavorable places. * * * The * * * trustees can, and do, at will restrict and limit the production and supply of alcohol, spirits, and other liquors, and thereby enhance their value.

The distillery of the defendant was brought into the trust in the manner described, and later, by order of the trustees, it was closed and ceased to do business. Finally, the directors were authorized to sell all the property, cancel and surrender all stock, dissolve the corporation, and notify the secretary of state of Nebraska to that effect. Quo warranto proceedings were instituted to obtain a forfeiture of the franchise. The court held that the corporation was without power to dispose of all its property, franchises, and powers necessary to carry on its business; that the object of the trust was illegal, as destroying competition and creating a monopoly; that the original conveyance by the defendant of its property with such purpose in view was void; and that as there had been an abuse of the corporate franchise it would be annulled.

In the New York case mentioned, Pittsburg Carbon Co. (Ltd.) *v.* McMillin, receiver,[1] the court held that competing corporations, for the purpose of furthering a combination in restraint of trade, can not lawfully transfer control of their affairs to a single individual trustee. In this case it appeared that in 1887 the plaintiff, together with eight other companies manufacturing electric-light carbons, entered into an agreement by which the business of the nine companies should be exclusively managed and directed by one Hawks as trustee. He was to designate the kind of goods to be manufactured, fix the prices at which and the persons to whom they should be sold, and, after paying expenses, divide the profits as provided by the agreement. The plaintiff assigned to the trustee all existing contracts, and he assumed their performance. Carbons manufactured in plaintiff's factory were billed in the name of the trustee and delivered to the Brush Electric Co. under an outstanding contract with plaintiff. The plaintiff withdrew from the combination, and an action was brought in Ohio by other members to wind up its affairs, the defendant being appointed receiver. Plaintiff claimed that the Brush Electric Co. should pay it for the carbons delivered, and not pay to the trustee. Payment not being made, this action was brought. The defendant, McMillin, receiver of the combination, also brought an action against the Brush Electric Co. The amount claimed was paid into court and the receiver was substituted for the Brush company as defendant. The court held that the agreement between the plaintiff and the trustee was illegal, for the reason that it was entered into in furtherance of a combination in restraint of trade; that to sustain

[1] 119 N. Y., 46 (1890).

the action would permit the plaintiff to escape from the operation of the rule which denies affirmative relief to a party to an illegal contract; and that as between the plaintiff and the receiver the latter was entitled to the fund.

Another important case where a trust agreement was involved is Bishop *v.* American Preservers' Co.,[1] in which the facts were as follows: The American Preservers' Co. was a voluntary association of the stockholders of seven corporations in different States engaged in preserving fruit. The agreement among them provided for the creation of a board of nine trustees, to whom the parties were to transfer their shares in exchange for trust certificates. The trustees were to hold such shares and receive the dividends for distribution as dividends upon the certificates. The trustees were authorized to purchase the stock of other corporations by the issue of trust certificates and to organize other corporations to carry on the business of the trust and to hold the stock of such corporations. The trust was to remain in force 25 years, unless sooner terminated with the consent of a certain number in excess of a majority of the certificate holders, and the trustees could not sell or surrender any stock held by them without the consent of a majority in number and value of the holders of the certificates. The trustees incorporated the American Preservers' Co., which brought an action against Bishop to obtain possession of certain stock in trade, machinery, etc., which he had agreed to transfer to said corporation, and for which he had given a bill of sale, and received trust certificates. Bishop tendered the certificates back, retained the property, and defended on the ground that the corporation was an instrument of an unlawful trust and without standing in court. The court held that the illegal purpose of the trust agreement was apparent on its face, and it was void as being injurious to the public interest; that the bill of sale rested under the ban of the law, and that the court would not aid in the recovery of the property, but would leave the parties where they were when the suit was begun.

CORPORATE COMBINATIONS.—The attitude of the courts in declining to uphold direct agreements limiting competition among competing concerns, as well as trust agreements having the same object, led to the formation of corporate combinations in the hope that the courts would look upon them with more tolerance. Some grounds for this hope may have been contained, to some extent at least, in a dictum of the court in People *v.* North River Sugar Refining Co., where it was said (121 N. Y., at p. 624):

> It is said, however, that a consolidation of manufacturing corporations is permitted by the law, and that the trust or combination or partnership, however

[1] 157 Ill., 284 (1895).

it may be described, amounts only to a practical consolidation which public policy does not forbid because the statute permits it. (Laws of 1867, chap. 960; Laws of 1884, chap. 367.) The refineries did not avail themselves of that statute. They chose to disregard it, and to reach its practical results without subjection to the prudential restraints with which the State accompanied its permission. If there had been a consolidation under the statute, one single corporation would have taken the place of the others dissolved. They would have disappeared utterly, and not, as under the trust, remained in apparent existence to threaten and menace other organizations and occupy the ground which otherwise would be left free. Under the statute the resultant combination would itself be a corporation deriving its existence from the State, owing duties and obligations to the State, and subject to the control and supervision of the State, and not, as here, an unincorporated board, a colossal and gigantic partnership, having no corporate functions and owing no corporate allegiance. Under the statute the consolidated company taking the place of the separate corporations could have as capital stock only an amount equal to the fair aggregate value of the rights and franchises of the companies absorbed; and not as here a capital stock double that value at the outset and capable of an elastic and irresponsible increase. The difference is very great and serves further to indicate the inherent illegality of the trust combination.

At the time that the above opinion was rendered, however, it had already been decided on common-law principles in Michigan, in the case of Richardson *v.* Buhl,[1] that a corporate combination formed for monopolistic purposes was illegal. In that case it appeared that the Diamond Match Co., a Connecticut corporation, had been organized for the purpose of monopolizing and controlling the making of friction matches and establishing the price thereof by uniting in one corporation all match-manufacturing interests in the United States. To accomplish this object it became necessary to acquire many plants and to require the owners not to reenter the business for 10 years or more. The Richardson Match Co., a Michigan corporation located at Detroit, was one of the companies sold to the Diamond Match Co. The complainant owned or controlled all of the stock of the Richardson Match Co. In the transaction by which this stock was exchanged for that of the Diamond Match Co. the defendant made certain advances of money to the complainant and became surety for the latter and the Richardson Match Co. on various obligations. This advance was secured by the assignment of some 1,800 shares of the Richardson Match Co., with the right to vote same and to retain dividends, the stock to be returned when the obligations were satisfied. The defendants also became officers of the company. The loan by defendants to complainant was used to pay for preferred stock of the Diamond Match Co., the greater part of which was indorsed to Buhl to secure payment of the loan. Contracts were entered into with respect to the manner in which the dividends from the stock held as collateral should be divided and

[1] 77 Mich., 632 (1889).

applied, and providing for a sale in case of default. A bill was brought to enjoin the sale of the security, and from a decree directing a retransfer of the stock to the complainant and finding a large sum due from the defendants, the latter appealed. No question as to the validity of the contract or combination on the ground of public policy, or otherwise, was raised by the parties, but the court, of its own motion, held that the objects sought to be attained in the formation and organization of the Diamond Match Co. were unlawful, as creating a monopoly in a necessity, and that the contract in question, being made to further its objects and purposes, was void as against public policy.

A few years later substantially the same result was reached by the court in Distilling & Cattle Feeding Co. *v.* People.[1] In that case a writ in the nature of quo warranto was filed, alleging that for the purpose of controlling and establishing a monopoly in the manufacture and sale of distilling products various corporations had formed a trust and placed their stock in the hands of nine trustees; that the combination had absorbed 81 distilleries; that subsequently the Distilling & Cattle Feeding Co. was incorporated in Illinois, the nine trustees constituting the directors; that the property of the constituent corporations was conveyed to the new corporation, which eventually controlled and substantially monopolized the business of manufacturing high wines, spirits, and distillery products in the United States, and that it has been enabled to and did dictate prices to all consumers at pleasure. Defendant was ousted from its franchise and appealed. It was urged that the change in the form of organization from an unincorporated association to a corporation and the change in the mode of holding distillery properties by surrendering the stock of the constituent corporations and having the properties themselves conveyed to the defendant purged the combination of any illegality. In affirming the judgment of the court below, it was held that the Distillers & Cattle Feeders' Trust, which preceded the incorporation of the defendant, was an organization which contravened well-established principles of public policy and was therefore illegal; that as the corporation merely succeeded the trust, its operations being carried on in the same way and by the same agencies as before, and as the control exercised over the distillery business and the virtual monopoly formerly held by the trust were in no degree changed or released, it was as essentially opposed to public policy as when the trust was in existence. Corporate organization could not purge the trust scheme of its illegality. The charter authorizing the defendant to engage in a general distillery business in Illinois and elsewhere and to own property necessary for that pur-

[1] 156 Ill., 448 (1895).

pose gave no power to enter upon a scheme of getting control of substantially all the distillery business of the country for the purpose of controlling production and prices, crushing competition, and establishing a virtual monopoly in that business.

The decision in the preceding case was followed in Harding *v.* American Glucose Co.[1] In the latter case the complainant was a stockholder of that company, which was a New Jersey corporation doing business at Peoria, Ill. It was charged, among other things, that the officers and directors of the corporation were about to make a sale of the plant at Peoria to a new corporation (the Glucose Sugar Refining Co.) and to abandon the business theretofore conducted; that five other corporations engaged in the same business were about to sell their plants to the new corporation; that all these sales constituted one transaction; and that the arrangement constituted a giant pool, trust, or combine, formed for the purpose of controlling the prices of glucose and grape sugar, of suppressing competition, and of creating a monopoly. The alleged method employed was to merge the plants by issuing stock in the new corporation, and where this method failed to buy such organizations and plants for cash. It was in evidence that there were only seven corporations engaged in the manufacture of glucose, and that one of them had refused to enter the combination; that glucose could not be successfully manufactured except in what is known as the corn belt of the United States; that the corn belt constituted an ellipse of about 950 miles in length and about 700 miles in width, with Peoria as the geographical center, and all within 1,000 miles of Chicago; that the contract between the American Glucose Co. and the new corporation provided that the former would not for 25 years within a radius of 1,500 miles of Chicago engage in the business of buying, manufacturing, or selling glucose, grape sugar, or any of the products of any glucose factory; and that somewhat similar contracts had been made with the other corporations. The agreement was carried into effect while the litigation was pending, and it was proved that as soon as the new organization undertook the operation of the plants conveyed to it, the prices of glucose and its products were advanced. The bill was dismissed and the complainant appealed. In reversing the decree the court held, among other things, that any combination of competing corporations for the purpose of controlling prices, or limiting production, or suppressing competition, was contrary to public policy; that the public policy of Illinois had always been against trusts and combinations organized for the purpose of suppressing competition and creating monopoly; that such policy was manifested by the decisions of its courts and the antitrust acts of 1891 and 1893; that under the circumstances the agreement not to

[1] 182 Ill., 551 (1899).

manufacture and sell glucose within 1,500 miles of Chicago amounted to a total restraint of trade, was void, and the transaction, of which it was a part, illegal. The decree dismissing the bill was reversed and the cause was remanded with instructions to enter a decree setting aside the deed to the Glucose Sugar Refining Co. and all contracts, assignments, and other instruments accompanying its delivery, so far as the American Glucose Co. and its directors, officers, and stockholders were concerned. The following is quoted from the opinion of the court:

The material consideration in the case of such combinations is, as a general thing, not that prices are raised, but that it rests in the power and discretion of the trust or corporation taking all the plants of the several corporations to raise prices at any time, if it sees fit to do so. It does not relieve the trust of its objectionable features, that it may reduce the price of the articles which it manufactures, because such reduction may be brought about for the express purpose of crushing out some competitor or competitors. * * * The transfer of its property, made by the American Glucose Co., was a transfer to a corporation, created for the express purpose of taking its property and the property of other corporations, so as to use them in the suppression of competition, and in the creation of a monopoly in the manufacture of glucose, and grape sugar, and their products and by-products. The whole scheme, as devised and consummated, was a fraud not only on the public but upon the dissenting stockholder filing this bill. * * * This contract [not to manufacture, etc.] indicates clearly that the object of the whole scheme was to suppress competition in the manufacture of the products referred to and to create a monopoly therein.

CHAPTER III.

THE FEDERAL ANTITRUST LAWS AND THEIR INTERPRETATION.

Section 1. Introductory.

This chapter presents, in its first part, the text of the Sherman Antitrust Act.

The second part of the chapter seeks to show the scope of the application of this act as determined by judicial decisions, especially with respect to certain kinds of combinations which fall within its prohibitions. The constitutionality of the Sherman Antitrust Act has been affirmed by the Supreme Court, the meaning of the terms used therein defined, and the scope of its application has been largely defined in the numerous cases that have been decided. The several sections indicate in a broad way what the judicial interpretation has been in these matters. In regard to the application of the act, no effort has been made at a minute analysis, the classification adopted being intended to show the ground broadly as to (1) kinds of persons or business affected (e. g., manufacturers, merchants, farmers, laborers, railroads, etc.), and (2) the chief devices for forming business combinations which have been held to be within the meaning of the law (e. g., price agreements, holding companies, mergers, etc.). This grouping, therefore, is not, nor is it intended to be, an exhaustive analysis of the decisions, but rather one of a practical character from the point of view of the layman as distinguished from that of the lawyer. The extent to which the various remedies afforded by the Sherman Antitrust Act have been applied is also described.

The third part of the chapter contains statements concerning other important Federal legislation affecting trusts and combinations in restraint of trade, namely, certain parts of the Wilson Tariff Act of 1894, of the Panama Canal Act of August 24, 1912, of the Federal Trade Commission Act of September 26, 1914, and of the Clayton Antitrust Act of October 15, 1914.

THE SHERMAN ANTITRUST ACT.

Section 2. Text of law.

The first and second sections of the Sherman Antitrust Act contain the two principal prohibitions, namely, against every contract, combination, or conspiracy, in restraint of interstate or foreign commerce, and against monopolizing or attempting to monopolize the same:

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign

nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

The third section applies the prohibitions of the first section to commerce within the Territories or the District of Columbia or to commerce between such jurisdictions or between them and the States and foreign nations:

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sections 4 and 5 give the circuit courts jurisdiction to enforce the law and provide that proceedings in equity may be brought by the United States Government to prevent and restrain violations thereof. The courts may make other persons parties to the proceedings:

SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

SEC. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

Section 6 authorizes the seizure and condemnation of property in the course of transportation in interstate commerce or to a foreign country belonging to combinations, etc., prohibited in the first section:

SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this

act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

Section 7 gives to any person injured by reason of violation of this law a right to sue for treble damages, costs, etc.:

SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Section 8 defines the word "person" to include corporations:

SEC. 8. That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

JUDICIAL INTERPRETATION.

Section 3. Topics considered.

The following sections (3 to 24) are intended to show the judicial interpretations of the Sherman Antitrust Act in regard to the following subjects: Constitutionality; interstate commerce; foreign commerce; restraint of trade; monopolize and attempt to monopolize; trading and manufacturing combinations; labor combinations; railroad combinations; farmers' combinations; mergers; holding companies; agreements to fix prices; agreements to limit output; agreements to apportion output; agreements to divide territory; agreements to divide earnings or profits; corners; patent combinations; agreements to fix resale prices, and the question of the certainty of the law. There is also a short section to show the extent to which the various remedies afforded by this law have been applied.

In each of these sections a particular topic is considered, including a general statement, a brief summary of the leading case or cases, and sometimes a few citations of other important cases bearing on the same subject.[1]

Section 4. Constitutionality.

The constitutionality of the Sherman Antitrust Act was decided at a comparatively early date in favor of the power of Congress to prohibit combinations in restraint of trade in interstate commerce under the clause of the Constitution which grants to Congress the power to regulate commerce among the States and with foreign nations.

[1] Cases subsequent to Mar. 15, 1915, are not covered by this report.

UNITED STATES *v.* JOINT TRAFFIC ASSOCIATION (171 U. S., 505), SUPREME COURT, 1898.—Thirty-one railroad companies engaged in interstate transportation between Chicago and the Atlantic seaboard made an agreement with respect to rates of transportation on their lines, and a suit in equity was instituted by the Government to declare the agreement null and void and to enjoin its performance. One defense set up was that the law as interpreted by the Supreme Court in the Trans-Missouri Freight case, namely, as prohibiting contracts in reasonable restraint of trade, was unconstitutional as depriving the defendants of their liberty and property without due process of law and as depriving them of the equal protection of the laws. The court held that Congress in regulating the interstate commerce of railroad corporations has the power to prohibit all contracts or combinations which restrain trade by shutting out competition.

The court said in part (pp. 572–573):

Notwithstanding the general liberty of contract which is possessed by the citizen under the Constitution, we find that there are many kinds of contracts which, while not in themselves immoral or *mala in se*, may yet be prohibited by the legislation of the States or, in certain cases, by Congress. The question comes back whether the statute under review is a legitimate exercise of the power of Congress over interstate commerce and a valid regulation thereof. The question is, for us, one of power only, and not of policy. We think the power exists in Congress, and that the statute is therefore valid.

NORTHERN SECURITIES CO. *v.* UNITED STATES (193 U. S., 197), SUPREME COURT, 1904.—The Northern Securities Co. was organized as a holding corporation. At the time of the commencement of the suit it held more than nine-tenths of the stock of the Northern Pacific Railroad Co. and more than three-fourths of the stock of the Great Northern Railroad Co., corporations having competing and substantially parallel lines from Duluth and St. Paul to the Pacific coast. The shareholders of the two railroad companies in lieu of their stock were to receive, upon an agreed basis, shares in the Securities company. The Securities company voted the stock held, and collected the dividends thereon, and in turn declared dividends on its stock. The management of the two roads was thus placed under the same control, and competition was eliminated. A suit in equity was brought by the Government to declare the combination or conspiracy unlawful, to enjoin the Northern Securities Co. from acquiring, holding, or voting said shares, and to enjoin the stockholders of the two railroad companies from carrying on the scheme to put the two railroad companies under the control of the Securities company. The suit was defended on the ground that the power of Congress to regulate interstate commerce does not give it the right to regulate or to control the ownership of shares of stock of corporations engaged therein.

The court held this combination was contrary to the Sherman Act, and that the prohibition of such a scheme was within the power of Congress.

Section 5. Interstate commerce.

The meaning of interstate commerce with respect to the prohibitions of the Sherman Act has been defined in numerous decisions, but it must suffice in this connection to point out a few of the leading distinctions made in the decisions of the Supreme Court in connection with the interpretation of the Antitrust Law. To present all the distinctions which have been made regarding what is interstate commerce and what is not would require a review of practically all the cases under the Sherman Act as well as many others arising under the commerce clause of the Constitution.

An early decision (Knight case), which is discussed below, made a distinction between "manufacture" and "commerce," and held that a mere combination of manufacturers was not within the purview of the law. The circumstances of the case and its decision were so peculiar that little importance is attached to this decision to-day. (See p. 75.) In so far as a combination of manufacturers is directly engaged in selling goods in interstate or foreign commerce, it may come within the scope of the law.

Further light, moreover, is thrown on this subject by the consideration given to the kinds of business which are covered by the law, which are discussed in a broad way in sections 9 to 12, inclusive, of this chapter.

UNITED STATES *v.* E. C. KNIGHT CO. (156 U. S., 1), SUPREME COURT, 1895.—The American Sugar Refining Co. at the beginning of 1892 had refineries located in various States, with about two-thirds of the production of refined sugar in the United States under its ownership or control, and during 1892 it obtained all of the remainder except about 2 per cent, by acquiring through separate agreements at different times the shares of four independent refineries by exchanging shares of its own capital stock for the shares of the said companies. The Government sought to compel the cancellation of the agreements under which the shares were exchanged, and to enjoin further violations of the Sherman Act. The court held that the Sherman Act prohibited monopoly of interstate and international commerce, but not monopoly in manufacture, and that the business of refining sugar bore no direct relation to commerce among the States or with foreign nations.

The court said in part (pp. 12, 16–17):

Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation

of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce.

* * * It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted. Aside from the provisions applicable where Congress might exercise municipal power, what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several States or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfill its function. Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by the companies to other States for sale. Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree.

A strong dissenting opinion was rendered by Justice Harlan.

While the Knight case has never been expressly overruled, recent decisions have held similar combinations of manufacturing companies which sold their products in interstate commerce to be within the prohibitions of the Sherman Act.

In Standard Oil Co. *v.* United States (221 U. S., 1), 1911, and in United States *v.* American Tobacco Co. (221 U. S., 106), 1911, the Knight case was relied on by the defendants to exclude them from the operation of the law. In the former case, however, the court in referring to this argument, said (pp. 68–69):

That the act, even if the averments of the bill be true, can not be constitutionally applied, because to do so would extend the power of Congress to subjects *dehors* the reach of its authority to regulate commerce, by enabling that body to deal with mere questions of production of commodities within the States. But all the structure upon which this argument proceeds is based upon the decision in *United States* v. *E. C. Knight Co.*, 156 U. S., 1. The view, however, which the argument takes of

that case and the arguments based upon that view have been so repeatedly pressed upon this court in connection with the interpretation and enforcement of the Anti-trust Act, and have been so necessarily and expressly decided to be unsound as to cause the contentions to be plainly foreclosed and to require no express notice.

The Standard Oil Co. was directly engaged in transportation between the States, so that the Knight case would seem to have no application. In the Tobacco case, however, the transactions in question related purely to manufacturing tobacco and selling the same, but in spite of insistent argument by the defendants based on the Knight case the court disregarded this aspect of the question.

ADDYSTON PIPE & STEEL CO. *v.* UNITED STATES (175 U. S., 211), SUPREME COURT, 1899.—Six corporations manufacturing iron pipe and selling the same in interstate commerce entered into various agreements intended to enhance the price of pipe in such commerce, such as dividing the markets for the purpose of eliminating bidding on public contracts, etc. These concerns enjoyed the bulk of the trade in iron pipe in a large number of States. The Government sought an injunction against the continuation of this combination. It was contended that the agreements in question had no direct relation to interstate commerce, and under the precedent of the Knight case should not be held unlawful. The court held that agreements whereby all competition was eliminated from bidding on public contracts, so far as they related to sales for delivery beyond the State in which the sales were made, had a direct relation to interstate commerce and were within the prohibition of the Sherman Act.

The court said in part (pp. 240–242, 246, 247):

While no particular contract regarding the furnishing of pipe and the price for which it should be furnished was in the contemplation of the parties to the combination at the time of its formation, yet it was their intention, as it was the purpose of the combination, to directly and by means of such combination increase the price for which all contracts for the delivery of pipe within the territory above described should be made, and the latter result was to be achieved by abolishing all competition between the parties to the combination. The direct and immediate result of the combination was therefore necessarily a restraint upon interstate commerce in respect of articles manufactured by any of the parties to it to be transported beyond the State in which they were made.

* * * * * * *

As has frequently been said, interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S., 196, 203; *Kidd* v. *Pearson*, 128 U. S., 1, 20. If, therefore, an agreement or combination directly restrains not alone the manufacture, but the purchase, sale or exchange of the manufactured commodity among the several States, it is brought within the provisions of the statute. * * * any agreement or combination which directly operates, not alone upon the manufacture, but upon the sale, transportation and delivery of an article of interstate commerce, by preventing or restricting its sale, etc., thereby regulates interstate commerce to that extent and to

the same extent trenches upon the power of the national legislature and violates the statute. We think it plain that this contract or combination effects that result.

* * * Where the contract is for the sale of the article and for its delivery in another State, the transaction is one of interstate commerce, although the vendor may have also agreed to manufacture it in order to fulfil his contract of sale. In such case a combination of this character would be properly called a combination in restraint of interstate commerce, and not one relating only to manufacture. * * *

In regard to such of these defendants as might reside and carry on business in the same State where the pipe provided for in any particular contract was to be delivered, the sale, transportation and delivery of the pipe by them under that contract would be a transaction wholly within the State, and the statute would not be applicable to them in that case. They might make any combination they chose with reference to the proposed contract, although it should happen that some nonresident of the State eventually obtained it.

HOPKINS *v.* UNITED STATES (171 U. S., 578), SUPREME COURT, 1898.—The Kansas City Live Stock Exchange was an unincorporated association of commission men doing business at stockyards partly located on each side of the boundary line between the States of Missouri and Kansas. The commission men, individually, received consignments of cattle from the said States and various other States and Territories and sold them for account of the owners. Members of the exchange were prohibited from employing agents except at a fixed salary, or sending prepaid telegrams or information as to the condition of the market. They were also prohibited from buying cattle from commission men in Kansas City who were not members of the exchange. The commission men, to a large extent, loaned money to the cattle raisers and took mortgages on the cattle for security; they also undertook to feed the cattle consigned, to prepare them for the market, etc. The Government brought a suit to dissolve the exchange and to enjoin further combination of like character, as in violation of the Sherman Act.

The court held that the location of the stockyards was not material with respect to the question of interstate commerce, and that the business of commission men was not interstate commerce.

The court said in part (pp. 590, 591):

The selling of an article at its destination, which has been sent from another State, while it may be regarded as an interstate sale and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce, and a combination in regard to the amount to be charged for such service is not, therefore, a combination in restraint of that trade or commerce.

MONTAGUE & CO. *v.* LOWRY (193 U. S., 38), SUPREME COURT, 1904.—An association of dealers in tiles in California and manufacturers of tiles in other States was formed, whereby the dealers agreed to buy from such manufacturers only and to sell unset tiles to other dealers at list prices, which were more than 50 per cent higher than the prices they paid the manufacturers, the manufacturers agreeing, on the

other hand, to sell to member dealers only. Lowry, an independent dealer, brought an action for damages under section 7 of the Antitrust Act. The court held that although the sales of unset tiles were within the State of California, and although this scheme aimed at an enhancement of prices in California, it was so bound up with the agreement of manufacturers in other States not to sell to nonmembers that it amounted to a restraint of interstate commerce within the meaning of the Sherman Act.

The court said in part (pp. 45–48):

It is urged that the sale of unset tiles, provided for in the seventh section of the by-laws, is a transaction wholly within the State of California and is not in any event a violation of the act of Congress which applies only to commerce between the States. The provision as to this sale is but a part of the agreement, and it is so united with the rest as to be incapable of separation without at the same time altering the general purpose of the agreement. The whole agreement is to be construed as one piece, in which the manufacturers are parties as well as the San Francisco dealers, and the refusal to sell on the part of the manufacturers is connected with and a part of the scheme which includes the enhancement of the price of the unset tiles by the San Francisco dealers. The whole thing is so bound together that when looked at as a whole the sale of unset tiles ceases to be a mere transaction in the State of California, and becomes part of a purpose which, when carried out, amounts to and is a contract or combination in restraint of interstate trade or commerce.

* * * the combination, if carried out, directly effects a restraint of interstate commerce. * * *

The purchase and sale of tiles between the manufacturers in one State and dealers therein in California was interstate commerce within the *Addyston Pipe case*, 175 U. S., 211. It was not a combination or monopoly among manufacturers simply, but one between them and dealers in the manufactured article, which was an article of commerce between the States.

GIBBS *v.* MCNEELEY (118 FED., 120), CIRCUIT COURT OF APPEALS, 1902.—An association comprising manufacturers of and dealers in red-cedar shingles existed in the State of Washington, which was the only State in which red-cedar shingles were produced, and the members thereof sold such shingles chiefly to residents in other States. The said association restricted the output of shingles and fixed the prices at which they were sold. A dealer brought an action under the Sherman Law for damages sustained from the said acts. The court held the association to be a combination in restraint of interstate commerce, and said in part (p. 126):

The defendants in error were engaged in manufacturing a product of which, as they well knew, more than 80 per cent was to be sold, delivered, and used in States other than that of its manufacture. They were in the business of selling and delivering shingles to purchasers in other States. In fixing a list of prices they fixed it not alone for domestic trade, but for external commerce as well. The inevitable result of the combination is to enhance the price and restrain the trade of shingles in all the States. In the E. C. Knight Co. case it was held that a monopoly to manufacture did not necessarily affect interstate commerce. The reason for so holding is apparent. From the creation of a monopoly to manufacture, it does not necessarily follow that interstate commerce in the monopolized article will in any degree be interfered with. The

total production of the manufactured article and its price may, notwithstanding the monopoly, remain unaffected. In that case it was said, "There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce." But this can not be said of a combination of manufacturers in one State who agree to arbitrarily increase the price and diminish the total output of a manufactured product which is made only in that State, but which is principally bought and used in other States. The intention to put a restraint upon interstate commerce in such a case is evident, and the restraint is not indirect, but direct, and it is the necessary and inevitable result of the combination.

Section 6. Foreign commerce.

The decisions of the courts with respect to what constitutes commerce "with foreign nations" in connection with the interpretation of the Sherman Law are few in number, and the two decisions rendered by the Supreme Court involving an exposition of the law on the subject touch this matter in an almost incidental way. While in the first opinion (United Fruit Co. case, see p. 80 below) the court discussed the question very briefly, it was held that acts committed in a foreign country and not repugnant to its laws, although done in pursuance of a conspiracy entered into in the United States with intent to restrain the importation of goods into the United States by the plaintiff afforded it no ground for a private action for damages. It may be pointed out in this connection that no reference was made to the provisions of the Wilson Tariff Act of 1894, sections 73 to 77 (see pp. 125–126), regarding restraint of trade in the importation of goods from foreign countries. It is noteworthy, however, that in a suit by the Government to restrain the execution of a contract in restraint of foreign commerce (see p. 81) the circuit court in its opinion specifically referred to the fact that it contemplated the commission of acts in this country. In a case in the Circuit Court of Appeals (see below) prior to the above-mentioned decision of the Supreme Court, no distinction of this character appears to have been made, and the opinion does not show where the acts held to be a violation of the law were committed. According to the opinion of the circuit court above referred to, the execution of a contract to restrain the export trade of the United States, entered into in a foreign country but involving acts done in this country, may be prevented.

THOMSEN *v.* UNION CASTLE MAIL S. S. CO. ET AL. (166 FED. 251), CIRCUIT COURT OF APPEALS, 1908.—This was an action for treble damages under the Sherman Law. The plaintiff alleged that defendants, carriers in the South African trade, had united as "The South African Lines," fixed rates and required shippers to pay a percentage in addition to a reasonable freight rate which they should receive back if they did not ship by other lines. The court held that the manifest purpose of the combination was to prevent competition between members by maintaining uniform rates and to eliminate competition

with other lines by requiring shippers to pay that which was equivalent to forfeit money; that the fact that the combination was formed in a foreign country was immaterial, as it affected the foreign commerce of this country and was put into operation here. The combination was, therefore, unlawful under the Sherman Act.

AMERICAN BANANA CO. *v.* UNITED FRUIT CO. (213 U. S. 347), SUPREME COURT, 1909.—Both parties to this action to recover treble damages under the Sherman Act were corporations organized in the United States. It was alleged in substance that the defendant was organized in 1899 and was engaged in importing bananas into the United States from Central and South America; that for the purpose of monopolizing such trade between such countries, of regulating prices, controlling production, and preventing competition, the defendant acquired the property and business of several competitors, entered into contracts regulating prices and restricting business with other competitors, acquired the controlling interest in others, and organized a common selling agent for all; that in 1903 one McConnell started a banana plantation in Panama and began to build a railway to the nearest port, affording the only practicable means of access to the plantation; that he was notified by the defendant that he must either combine or stop; that the plaintiff corporation, organized for the purpose of growing and buying bananas in Central America and importing them into the United States, purchased said plantation and railroad concession from McConnell; that subsequently Costa Rican soldiers and officials, instigated by the defendant, seized a portion of the plantation and a cargo of supplies, and stopped the construction of the railway; that the plaintiff tried to induce Costa Rica to withdraw its soldiers and officials and tried to induce the United States to interfere but was thwarted in both by the defendant; that the defendant purchased an alleged title to the plaintiff's plantation; that the defendant and its associates combined to prevent the sale of bananas to other exporters than themselves and made such arrangements with growers that there was no market in which bananas could be purchased by the plaintiff for export, and had prevented the plaintiff from buying for export and sale; and that the defendant had sought to injure the plaintiff's business by offering positions to its employees and by discharging or threatening to discharge its own employees who were stockholders of the plaintiff corporation.

The circuit court dismissed the complaint upon motion, as not setting forth a cause of action. This judgment was affirmed by the Circuit Court of Appeals and the case was brought to the Supreme Court by writ of error. The judgment was again affirmed, the court holding that damages can not be recovered for injury resulting from the acts of a foreign sovereignty, done within its own territory, though induced by defendants in furtherance of a conspiracy to restrain the

foreign commerce of the United States; nor for acts of defendants done in foreign territory but permitted by local law, though done pursuant to a conspiracy entered into in this country.

Regarding the acts of representatives of the United Fruit Co., done in Panama, the court says (p. 359):

As to the buying at a high price, etc., it is enough to say that we have no ground for supposing that it was unlawful in the countries where the purchases were made. Giving to this complaint every reasonable latitude of interpretation we are of opinion that it alleges no case under the act of Congress and discloses nothing that we can suppose to have been a tort where it was done. A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law.

UNITED STATES *v.* HAMBURG-AMERIKANISCHE PACKET-FAHRT-ACTIEN-GESELLSCHAFT ET AL. (200 FED. 806), CIRCUIT COURT, 1911.—The Government filed its bill to restrain the further execution of an agreement to form an association called the Atlantic Conference, relating to the carriage of steerage passengers between the United States and Europe.

The bill alleged a contract providing for a division of traffic, the pooling of receipts, and the enforcement of the agreement. The fixing of rates, it was charged, was left to individual discretion, though the holders of 75 per cent of the shares of traffic could direct any party to raise or reduce its charges. The bill also alleged excessive and arbitrary rates as a result of the combination and a virtual monopoly of the steerage passenger traffic covered by the agreement. A demurrer interposed by the defendants was overruled, the court holding that (1) the agreement directly and materially affected the foreign commerce of the United States in that it diverted a part thereof, viz, the business of carrying steerage passengers (the court limiting its remarks to eastbound traffic) from the natural channels of free competition and prescribed what percentage each line should carry; (2) it was immaterial where the agreement was entered into; (3) the averments made out a combination and conspiracy in violation of the Sherman Act. The court, in part, said (p. 807):

The agreement directly and materially affects foreign commerce and is partly intraterritorial because it is to be carried out in part in the United States. Confining ourselves to eastbound traffic, it is evident that the contract contemplates the solicitation of business, the making of contracts of carriage, the taking on board of passengers, and the actual commencement of transportation within the territory of the United States. It requires acts to be done in this country; such acts are as material and essential as those to be performed abroad, and the part of the contract requiring them can not be separated from the remainder

When this case came up for trial in the district court the terms of the conference agreement were held to be reasonable and not in violation of the Sherman Law, but an injunction issued restraining

the defendants from combining to place special vessels, called "fighting ships," near the vessels of steamship lines not members of the defendant combination and bidding below their own rates in order to take the traffic away from a rival line.[1]

UNITED STATES *v.* PACIFIC & ARCTIC RAILWAY & NAVIGATION CO. ET AL. (228 U. S., 87), SUPREME COURT, 1913.—In this case four corporations, one organized under the laws of West Virginia, one under the laws of Canada, and two under the laws of British Columbia, together with certain of their officers, were indicted for a conspiracy to monopolize and for a monopolization of the transportation between ports in the United States, British Columbia, and Alaska. The route over which the traffic moved was by steamship lines from ports in the United States and Vancouver to Skagway, thence via railroad to the headwaters of the Yukon River, thence by boat down the Yukon River to Dawson and other places. It was urged on demurrer to the indictment that as part of the transportation route was outside of the United States the Sherman Act did not apply. Respecting this contention, the Supreme Court, in reversing a judgment sustaining the demurrer, said in part (pp. 105–106):

> The next contention of defendants is that as part of the transportation route was outside of the United States the Antitrust Law does not apply. The consequences and, indeed, legal impossibility are set forth to such application, and, it is said, "make it obvious that our laws relating to *interstate* and *foreign* commerce were not intended to have any effect upon the carriage by foreign roads in foreign countries, and * * * it is equally clear that our laws cannot be extended so as to control or affect the foreign carriage." This is but saying that laws have no extra-territorial operation; but to apply the proposition as defendants apply it would put the transportation route described in the indictment out of the control of either Canada or the United States. These consequences we cannot accept. The indictment alleges that the four companies which constitute the White Pass & Yukon Route (referred to as the railroad) and owned and controlled by the same persons, entered into the combination and conspiracy alleged, with the intention alleged, with the Wharves Company and the defendant steamship companies. In other words, it was a control to be exercised over transportation in the United States, and, so far, is within the jurisdiction of the laws of the United States, criminal and civil. If we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such citizens and corporations operating in our territory, as we undoubtedly may control our own citizens and our own corporations.

UNITED STATES *v.* PRINCE LINE ET AL.; UNITED STATES *v.* AMERICAN-ASIATIC S. S. CO. ET AL. (220 FED., 230), DISTRICT COURT, 1915.—These cases were both suits to dissolve steamship conferences similar in many respects to that involved in the Hamburg-American case. The traffic of the lines was between the United States and foreign countries, and in the Prince Line case, at least, the defendant steamship lines were all alien corporations or copartnerships, with their principal places of business in foreign countries. While

[1] U. S. *v.* Hamburg-American S. S. Line et al., 216 Fed., 971 (1914).

the terms of the conference agreements were held not to violate the Sherman Antitrust Act, the defendants were enjoined in the Prince Line case from refusing to carry cargo at their regular berth rates when there was unengaged space in their vessels.

AMERICAN TOBACCO CO. *v.* UNITED STATES (221 U. S., 106), SUPREME COURT, 1911.—In this case the lower court dismissed the Government's bill as to two foreign corporations named as defendants, viz, the Imperial Tobacco Co. and the British-American Tobacco Co. On appeal the Government contended that the bill against these companies should not have been dismissed but that the companies should have been commanded to observe the Sherman Act so far as their dealings in the cases were concerned.

The final decree in the suit directed, among other things, that covenants between the Imperial Tobacco Co., the American Tobacco Co., and the American Cigar Co., by which the former and certain of its directors agreed not to engage in the manufacture or sale of tobacco in the United States, and the two American companies and certain of their directors agreed not to engage in said business in Great Britain or Ireland, and all three agreed not to engage in said business in countries other than Great Britain, Ireland, and the United States be rescinded, except such as related wholly to business in foreign countries or such as were covenants exclusively between foreign corporations and related wholly to business in or between foreign countries.

It may be noted that it was provided in the contracts containing the objectionable covenants that they should be construed and take effect as contracts made in England and in accordance with the law of England.

Section 7. Restraint of trade.

The meaning of the term "restraint of trade" as used in the Sherman Act, has been the subject of frequent definition by the courts. The first authoritative view was given by the Supreme Court in the Trans-Missouri Freight Association case (see p. 84), and was in effect that every contract in restraint of trade, whether such restraint was reasonable in its character or not, was prohibited. This view was subsequently somewhat modified, at least in the form of expression, by the same justice in the same court, in the Joint Traffic Association case. (See p. 85.) A further departure from this view was made in the Standard Oil case (see p. 86), which was also followed in the American Tobacco case (see p. 88). In the last two cases the view taken was substantially that the restraint of trade which was prohibited by the Sherman Act could be determined by the courts by applying the same standard of interpretation that had been applied by the courts in the interpretation of the common law

in England and in this country with regard to restraint of trade and monopoly.

UNITED STATES *v.* TRANS-MISSOURI FREIGHT ASSOCIATION (166 U. S., 290), SUPREME COURT, 1897.—In 1889 certain railway companies formed an association agreement for the purpose, among other things, of fixing the rates of transportation, alleged to be reasonable, in an area comprising a large part of the United States, and of fining the members who failed to maintain the rates so fixed. This association continued in operation after the passage of the Sherman Act on July 2, 1890. The Government brought suit to have the association dissolved and the parties thereto enjoined from further combination of like character.

It was claimed by the Government that the rates fixed were excessive, but apparently no attempt was made to prove this point. The defendant railroads set up the defense that the rates were reasonable and that without such agreement the railroads would incur great loss and possibly ruin; hence, they claimed, the agreement was a reasonable restraint of trade and not prohibited by the act.

The court held that the prohibitions of the Sherman Act apply to all contracts in restraint of interstate or foreign commerce without exception or limitation, and are not confined to those in which the restraint is unreasonable.

The court said in part (p. 328):

> The term is not of such limited signification. Contracts in restraint of trade have been known and spoken of for hundreds of years both in England and in this country, and the term includes all kinds of those contracts which in fact restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere. By the simple use of the term "contract in restraint of trade," all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress.

As a possible but not explicit modification of this rigid and sweeping rule, the following sentence should be noted (p. 329):

> A contract which is the mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which in effect is collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale, might not be included, within the letter or spirit of the statute in question.

In a vigorous dissenting opinion of four justices it was denied, however, that the term "restraint of trade" had a generic meaning which included all contracts restraining the freedom of trade, whether reasonable or unreasonable, and that where such language was used it was not a definition. The dissenting opinion on this point was as follows (p. 346):

Is it correct to say that at common law the words "restraint of trade" had a generic signification which embraced all contracts which restrained the freedom of trade, whether reasonable or unreasonable, and, therefore, that all such contracts are within the meaning of the words "every contract in restraint of trade"? I think a brief consideration of the history and development of the law on the subject will not only establish the inaccuracy of this proposition, but also demonstrate that the words "restraint of trade" embrace only contracts which unreasonably restrain trade, and, therefore, that reasonable contracts, although they, in some measure, "restrain trade," are not within the meaning of the words. It is true that in the adjudged cases language may be found referring to contracts in restraint of trade which are valid because reasonable. But this mere form of expression, used not as a definition, does not maintain the contention that such contracts are embraced within the general terms every contract in restraint of trade.

UNITED STATES *v.* JOINT TRAFFIC ASSOCIATION (171 U. S., 505), SUPREME COURT, 1898.—The facts and the judgment of the court in this case have been given in some detail above (see p. 73); the combination in question was a rate-fixing agreement of railroad companies. Counsel for the railroads argued that an agreement to fix reasonable rates was not in restraint of trade within the meaning of the Sherman Act. The opinion of the court, which was given by the same justice as in the Trans-Missouri case, maintained the same position as before, but the language was much less sweeping and made the distinction between the restraints of a direct and indirect nature.

The court said in part (p. 568):

In *Hopkins v. United States*, decided at this term, *post*, 578, we say that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. We also repeat what is said in the case above cited, that "the act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it." To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri case* is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain

trade in some remote and indirect degree, is to make a most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this court.

This interpretation of every contract in restraint of trade provided a transition to the doctrine advanced in the Standard Oil case, which follows.

STANDARD OIL CO. *v.* UNITED STATES (221 U. S., 1), SUPREME COURT, 1911.—The Standard Oil Co., a New Jersey corporation engaged in refining oil, owned the capital stock of numerous other corporations engaged in producing oil, in transporting oil by pipe line, tank cars, tank vessels, etc., in refining oil, and in marketing oil in various States of the United States and in foreign countries. This corporation and its subsidiary companies transported more than four-fifths of the crude oil from the eastern oil fields, manufactured more than three-fourths of the refined oil in the United States, and marketed more than four-fifths of the illuminating oil and naphtha sold in the United States. The combination was consolidated by a trust agreement in 1882, which was superseded by a holding company in 1899. The trust and the holding company acquired through control of the subsidiary companies the power to fix the price of crude oil and the rates of transportation thereon. They also prevented competition between these numerous subsidiary companies. The Government claimed there was a continuing combination in restraint of trade and attempt to monopolize a part of interstate and foreign commerce. The court held that the Standard Oil Co. was a combination in restraint of interstate commerce.

The terms of the law, "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce," were held to signify all undue interferences with trade, of whatever form or description, and the existence of such interference was a matter for the court to determine according to the facts in the case and to the standard of reason which had been applied in the interpretation of the common law.

The court said in part (pp. 59–60):

(*a*) That the context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense.

(*b*) That in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation. The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign com-

merce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint.

(c) And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.

Regarding the relation of this interpretation of the law to previous judicial decisions on the same subject the court said (pp. 67–68):

And in order not in the slightest degree to be wanting in frankness, we say that in so far, however, as by separating the general language used in the opinions in the *Freight Association* and *Joint Traffic cases* from the context and the subject and parties with which the cases were concerned, it may be conceived that the language referred to conflicts with the construction which we give the statute, they are necessarily now limited and qualified. We see no possible escape from this conclusion if we are to adhere to the many cases decided in this court in which the Antitrust Law has been applied and enforced and if the duty to apply and enforce that law in the future is to continue to exist. The first is true, because the construction which we now give the statute does not in the slightest degree conflict with a single previous case decided concerning the Antitrust Law aside from the contention as to the *Freight Association* and *Joint Traffic cases*, and because every one of those cases applied the rule of reason for the purpose of determining whether the subject before the court was within the statute. The second is also true, since, as we have already pointed out, unaided by the light of reason it is impossible to understand how the statute may in the future be enforced and the public policy which it establishes be made efficacious.

Although the decision in this case was unanimous and eight justices concurred in the opinion thereon, which was prepared by the Chief Justice, one of them, Justice Harlan, wrote a separate opinion concurring in the conclusion of the court but dissenting from some of the language used in the opinion. The dissenting part of this opinion related to the interpretation of the words "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." Justice Harlan said in part (pp. 101–103):

When counsel in the present case insisted upon a reversal of the former rulings of this court, and asked such an interpretation of the Antitrust Act as would allow reasonable restraints of interstate commerce, this court, in deference to established practice, should, I submit, have said to them: "That question, according to our practice, is not open for further discussion here. This court long ago deliberately held (1) that the act, interpreting its words in their ordinary acceptation, prohibits *all* restraints of interstate commerce by combinations in whatever form, and whether reasonable or

unreasonable; (2) the question relates to matters of public policy in reference to commerce among the States and with foreign nations, and Congress alone can deal with the subject; (3) this court would encroach upon the authority of Congress if, under the guise of construction, it should assume to determine a matter of public policy; (4) the parties must go to Congress and obtain an amendment of the Antitrust Act if they think this court was wrong in its former decisions; and (5) this court can not and will not *judicially legislate*, since its function is to declare the law, while it belongs to the legislative department to make the law." Such a course, I am sure, would not have offended the "rule of reason."

But my brethren, in their wisdom, have deemed it best to pursue a different course. They have now said to those who condemn our former decisions and who object to all legislative prohibitions of contracts, combinations and trusts in restraint of interstate commerce, "You may *now* restrain such commerce, provided you are reasonable about it; only take care that the restraint is not undue." The disposition of the case under consideration, according to the views of the defendants, will, it is claimed, quiet and give rest to "the business of the country." On the contrary, I have a strong conviction that it will throw the business of the country into confusion and invite widely-extended and harassing litigation, the injurious effects of which will be felt for many years to come. When Congress prohibited *every* contract, combination or monopoly, in restraint of commerce, it prescribed a simple, definite rule that all could understand, and which could be easily applied by everyone wishing to obey the law, and not to conduct their business in violation of law. But now, it is to be feared, we are to have, in cases without number, the constantly recurring inquiry—difficult to solve by proof—whether the particular contract, combination, or trust involved in each case is or is not an "unreasonable" or "undue" restraint of trade. Congress, in effect, said that there should be *no* restraint of trade, *in any form*, and this court solemnly adjudged many years ago that Congress meant what it thus said in clear and explicit words, and that it *could not* add to the words of the act. But those who condemn the action of Congress are now, in effect, informed that the courts will allow such restraints of interstate commerce as are shown not to be unreasonable or undue.

UNITED STATES *v.* AMERICAN TOBACCO CO. (221 U. S., 106), SUPREME COURT, 1911.—The American Tobacco Co. was a combination of numerous concerns engaged in the manufacture of tobacco products and their sale in interstate commerce. In all the most important branches of the business (except cigars) it had acquired control of much the greater part of the total business in the United States. Apart from an initial combination of competitors, this was accomplished largely by buying out competitors individually, with the condition that they would not reengage in the business, and merging them into several larger companies. The combination also resorted to the use of bogus independent companies, excessive price cutting, and various other methods of unfair competition.

This combination the court declared to be contrary to both sections 1 and 2 of the Sherman Act, and in this connection defined the meaning of the term "restraint of trade" in the first section, as follows (pp. 179–180):

Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil Case* that as the words "restraint of trade" at common law and in the law of this country at the time of the adoption of the Antitrust Act only embraced acts or

contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, it was held, not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret which inevitably arose from the general character of the term restraint of trade required that the words restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect. The soundness of the rule that the statute should receive a reasonable construction, after further mature deliberation, we see no reason to doubt.

In this excerpt attention is called especially to the statement that "it was held, not that acts which the statute prohibited could be removed from the control of its prohibitions by finding that they were reasonable," but that the duty to interpret these general terms required that a reasonable construction should be given them.

Justice Harlan concurred with the court in the judgment rendered, but dissented with respect to certain matters connected with the decree, and particularly with respect to the interpretation of the term "restraint of trade" in the Sherman Act. He said in part (p. 192):

By every conceivable form of expression, the majority, in the *Trans-Missouri* and *Joint Traffic cases*, adjudged that the act of Congress did not allow restraint of interstate trade to any extent or in any form, and three times it expressly rejected the theory, which had been persistently advanced that the act should be construed as if it had in it the word "unreasonable" or "undue." But now the court, in accordance with what it denominates the "rule of reason," in effect inserts in the act the word "undue," which means the same as "unreasonable," and thereby makes Congress say what it did not say, what, as I think, it plainly did not intend to say and what, since the passage of the act, it has explicitly refused to say. It has steadily refused to amend the act so as to tolerate a restraint of interstate commerce even where such restraint could be said to be "reasonable" or "due." In short, the court now, by judicial legislation, in effect amends an act of Congress relating to a subject over which that department of the Government has exclusive cognizance. * * *

Section 8. Monopolize and attempt to monopolize.

The decisions under the Sherman Act which have depended on the application of section 2 of the law have been comparatively infrequent, at least in the Supreme Court, and in those decisions the instances where a clear statement appears of the meaning of the words "monopolize" and "attempt to monopolize" are rare. This is partly because in such cases the court has often been confronted with a complicated state of facts embracing a series of devel-

opments in business organization, a great variety of methods of conducting business, and a complex economic result.

The most important example of monopoly brought before the court was probably the Standard Oil Co., while one of the most subtle schemes to establish monopoly is found in the Wall Paper combination. Both of these are discussed below.

In the statement of facts in the Standard Oil case, a part of that given in the court below which is expressly referred to as being considered in the opinion, has been also summarized.

STANDARD OIL CO. *v.* UNITED STATES (221 U. S., 1), SUPREME COURT, 1911.—The facts in this case have been stated generally in another connection. (See p. 86.) Especially pertinent here are the following facts: The Standard Oil Co. had acquired almost complete domination of pipe-line transportation and was in a position to dictate crude-oil prices. Partly in consequence of this fact and partly in consequence of the combination of competing concerns under the control of a single corporation, it refined and sold much the greater part of the oil refined or sold in the United States.

The court held that the Standard Oil combination was in violation of section 2 of the Sherman Law. To "monopolize" or "attempt to monopolize," the court said, was forbidden with a view to make more complete the prohibitions of section 1, namely, by forbidding these methods of restraining trade also.

The court said in part (pp. 61, 62, 74, 75):

> Undoubtedly, the words "to monopolize" and "monopolize" as used in the section reach every act bringing about the prohibited results. The ambiguity, if any, is involved in determining what is intended by monopolize. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred[1] and the indication which it gives of the practical evolution by which monopoly, and the acts which produce the same result as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade. In other words, having by the first section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section. And, of course, when the second section is thus harmonized with and made as it was intended to be the complement of the first, it becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act and thus the public policy which its restrictions were obviously enacted to subserve. And it is worthy of observation, as we have previously remarked concerning the common law, that although the statute by the comprehensiveness of the enumerations embodied in both the first and second sections makes it certain that

[1] See pp. 4–5, 6.

its purpose was to prevent undue restraints of every kind or nature, nevertheless by the omission of any direct prohibition against monopoly in the concrete it indicates a consciousness that the freedom of the individual right to contract when not unduly or improperly exercised was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted. In other words that freedom to contract was the essence of freedom from undue restraint on the right to contract.

* * * * * * *

We see no cause to doubt the correctness of these conclusions, considering the subject from every aspect, that is, both in view of the facts established by the record and the necessary operation and effect of the law as we have construed it upon the inferences deducible from the facts, for the following reasons:

(*a*) Because the unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the *prima facie* presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed, the whole with the purpose of excluding others from the trade and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce.

(*b*) Because the *prima facie* presumption of intent to restrain trade, to monopolize and to bring about monopolization resulting from the act of expanding the stock of the New Jersey corporation and vesting it with such vast control of the oil industry, is made conclusive by considering (1) the conduct of the persons or corporations who were mainly instrumental in bringing about the extension of power in the New Jersey corporation before the consummation of that result and prior to the formation of the trust agreements of 1879 and 1882; (2) by considering the proof as to what was done under those agreements and the acts which immediately preceded the vesting of power in the New Jersey corporation as well as by weighing the modes in which the power vested in that corporation has been exerted and the results which have arisen from it.

CONTINENTAL WALL PAPER CO. *v.* LOUIS VOIGHT & SONS CO. (212 U. S., 227), SUPREME COURT, 1909.—More than 30 companies and firms manufacturing wall paper in various States and selling the same in interstate commerce formed a combination which comprised 98 per cent of the production and sales thereof in the United States. This combination organized the Continental Wall Paper Co., whose stock was owned and whose directors were chosen by the parties to the combination, and which was constituted a selling company for the said parties.

The Continental Wall Paper Co. in the further carrying out of the plan of combination made agreements with the jobbers of wall paper intended to compel them to patronize exclusively the members of the combination and to sell the goods purchased at prices fixed by the combination. Jobbers refusing such agreement were not to be supplied with wall paper. Immediately after forming this combination

the prices of wall paper were greatly enhanced, both to the jobbers and to consumers. One of the jobbers who owed the Continental Wall Paper Co. for wall paper purchased under such a contract was sued for payment thereon, and set up in defense that the obligation was not enforceable, for the reason that the contract was a part of a combination which was contrary to the Sherman Act. The plaintiff demurred thereto, thus confessing for legal purposes the truth of the facts alleged, and when the demurrer was overruled refused to plead further. The validity of the defense depended on whether this contract was a part of a combination in violation of the Antitrust Act. It was held that it was in violation of both sections 1 and 2 of the said act.

The court said in part (p. 255):

> That the combination represented by the plaintiff company is within the prohibitions of the above act of Congress is clear from the facts admitted by the demurrer. We assume, therefore, without discussion—for discussion is unnecessary—that there is a combination, of which the Continental Wall Paper Company is the representative, and that, in violation of that act, such combination was formed with the intent, and will have the effect, directly, to restrain as well as monopolize trade and commerce among the several States and with foreign nations.

The court approved also of the following part of the opinion of the court below (148 Fed., 947–948):

> The conspiring mills were situated in many states. The consumers [of wall paper] embraced the whole citizenship of the United States. The jobbers and wholesalers, who were to be coerced into contracts to buy their entire demands from the Continental Wall Paper Company or be driven out of business, were in every state.
>
> Before the combination, each of the combining companies was engaged in both state and interstate commerce. The freedom of each, with respect to prices and terms, was restrained by the agreement and interstate commerce directly affected thereby, as well as by the enhancement of prices which resulted. A more complete monopoly in an article of universal use has probably never been brought about. It may be that the wit of man may yet devise a more complete scheme to accomplish the stifling of competition; but none of the shifts resorted to for suppressing freedom of commerce and securing undue prices, shown by the reported cases, is half so complete in its details. None of the schemes with which this may be compared is more certain in results, more widespread in its operation, and more evil in its purposes. It must fall within the definition of a "restraint of trade," whether we confine ourselves to the common-law interpretation of that term, or apply that given to the term as used in the federal act.

Section 9. Trading and manufacturing combinations.

The Sherman Act is expressly directed against combinations in restraint of interstate trade; hence it is unnecessary to cite cases to show that trading combinations may be in the purview of the act. In fact, it must be shown that a combination directly affects interstate commerce or trade in order to bring it within the law. For this reason also an exhaustive statement of what is meant by interstate commerce would incidentally show what branches of business

or other activities are comprehended within the meaning of the law. It is more convenient, however, for a clear outline of the scope of the law to take up the principal branches of business activity separately.

Trading combinations in restraint of trade, as defined by the Supreme Court in recent decisions, as already stated, are within the prohibition of the law, provided they are engaged in interstate commerce.

In the discussion of the topic of interstate commerce it was shown that at the beginning a distinction was made in the Knight case (see p. 74 above) between manufacture and commerce, and it was held that combinations of manufacturers as such were not necessarily combinations in restraint of interstate trade. Practically all manufacturers and combinations of manufacturers, however, are engaged in trade and commerce, as there is no pecuniary profit in manufacture without the sale of the product. It is quite possible, of course, that a combination of manufacturers might exist which was not engaged in interstate or foreign commerce, and, therefore, would not be within the prohibition of the law. Generally speaking, however, manufacturing combinations are engaged in interstate commerce, and, if so engaged, would doubtless be held obnoxious to the Sherman Act, provided such combinations were in restraint of trade, as defined by the Supreme Court.

Section 10. Labor combinations.

That combinations of labor in so far as they are in restraint of interstate trade and commerce were prohibited by the Sherman Act was decided as early as 1893, but no decision was made on this subject by the Supreme Court until 1908, when this rule was affirmed. Labor combinations generally have not been held unlawful.

LOEWE *v.* LAWLOR, OR DANBURY HATTERS' CASE (208 U. S., 274), SUPREME COURT, 1908.—A manufacturer of hats at Danbury, Conn., engaged in interstate commerce in the sale of hats, was boycotted by the United States Hatters of North America, a labor union, because he would not agree to employ union labor exclusively. The hat manufacturer brought an action at law for the recovery of damages under section 7 of the Sherman Law. The brief of the defendants made no claim that combinations in restraint of trade, if made by laborers or labor unions, would be excluded from the operation of the act. The court held that the act was applicable to this case, and said in part (p. 301):

> Nor can the act in question be held inapplicable because defendants were not themselves engaged in interstate commerce. The act made no distinction between classes. It provided that "every" contract, combination or conspiracy in restraint of trade was illegal. The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act and that all these efforts failed, so that the act remained as we have it before us.

An important case in an inferior Federal court was the following:

UNITED STATES *v.* DEBS ET AL. (64 FED., 724), CIRCUIT COURT, 1894.—Debs and others had led a strike which forcibly interfered with the movement of trains and the transportation of the mails and goods. They were enjoined to desist, and failing to do so proceedings for contempt in equity were instituted. The court held that the court below had not exceeded its jurisdiction and that there was a conspiracy in restraint of trade contrary to the Sherman Act which was broad enough to embrace conspiracies of laboring men as well as of capitalists.

While this case was appealed and the judgment affirmed in the Supreme Court, the grounds of the decision were not the same. The Supreme Court, however, expressly stated that it did not thereby intend to deny the correctness of the opinion of the court below. (158 U. S. 564.)

Another case in an inferior Federal court, decided in 1893, was as follows:

UNITED STATES *v.* WORKINGMEN'S AMALGAMATED COUNCIL OF NEW ORLEANS (54 FED., 994), CIRCUIT COURT, 1893.—A labor combination which comprised workmen in various trades, including draymen, interfered with the shipment of goods in interstate commerce in New Orleans by threats and force to compel the employment of union labor only. The Government brought a suit in equity to obtain an injunction restraining such interference. The court granted the injunction, chiefly on the basis of the Sherman Act, on the ground that the members of the union were guilty of a conspiracy in restraint of interstate commerce.

The court said in part (p. 996):

> It is true this statute has not been much expounded by judges, but, as it seems to me, its meaning, as far as relates to the sort of combinations to which it is to apply, is manifest, and that it includes combinations which are composed of laborers acting in the interest of laborers.

The following case is of interest in this connection, as well as in connection with the Clayton Antitrust Act (see p. 138), in regard to the question of the constitutionality of the express exemption of labor combinations from the operation of the antitrust laws.

INTERNATIONAL HARVESTER CO. *v.* COMMONWEALTH OF MISSOURI (234 U. S., 199), SUPREME COURT, 1914.—Quo warranto proceedings against the International Harvester Co. in the supreme court of Missouri under the antitrust laws of that State were carried to the United States Supreme Court. The appellant company contended that the Missouri statute was unconstitutional because it exempted from its operation and penalties all "combinations of persons engaged in labor pursuits" and was limited to "persons and corporations dealing in commodities." The United States Supreme Court

held that the courts can not disturb the power of classification which a legislature may exercise "unless the courts can clearly see that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched."

After citing a number of cases the court went on to say (pp. 214–215):

> Other cases might be cited whose instances illustrate the same principle and in which this court has refused to accept the higher generalizations urged as necessary to the fulfillment of the constitutional guaranty of the equal protection of the law, and in which we, in effect, held that it is competent for a legislature to determine upon what differences a distinction may be made for the purpose of statutory classification between objects otherwise having resemblances. Such power, of course, cannot be arbitrarily exercised. The distinction made must have reasonable basis. * * *
>
> And so in the case at bar. Whether the Missouri statute should have set its condemnation on restraints generally, prohibiting combined action for any purpose and to everybody, or confined it as the statute does to manufacturers and vendors of articles and permitting it to purchasers of such articles; prohibiting it to sellers of commodities and permitting it to sellers of services, was a matter of legislative judgment and we cannot say that the distinctions made are palpably arbitrary, which we have seen is the condition of judicial review. It is to be remembered that the question presented is of the power of the legislature, not the policy of the exercise of the power. To be able to find fault, therefore, with such policy is not to establish the invalidity of the law based upon it.
>
> It is said that the statute as construed by the Supreme Court of the State comes within our ruling in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, but we do not think so. If it did we should, of course, apply that ruling here.

The Federal antitrust laws have been modified with respect to labor combinations by certain provisions of the Clayton Act which is described below. (See pp. 138, 141–142.)

Section 11. Railroad combinations.

The application of the Sherman Law to common carriers by railroad was established at a comparatively early date, namely, by a decision of the Supreme Court in 1897.

UNITED STATES *v.* TRANS-MISSOURI FREIGHT ASSOCIATION (166 U. S., 290), SUPREME COURT, 1897.—The facts in this case have been set forth above (p. 84), which, briefly stated, are that a rate-fixing pool had been formed by certain interstate railway companies, and continued to operate after the passage of the Sherman Act. The Government sought to have the railroad companies enjoined from further combinations of this character. The railroad companies claimed that the Sherman Law did not apply to them. The court held that contracts in restraint of interstate commerce made by railroad companies were within the prohibitions of the law.

The court said in part (pp. 312–314):

> A contract therefore that is in restraint of trade or commerce is by the strict language of the act prohibited even though such contract is entered into between competing

common carriers by railroad, and only for the purposes of thereby affecting traffic rates for the transportation of persons and property.

* * * An act which prohibits the making of every contract, etc., in restraint of trade or commerce among the several States, would seem to cover by such language a contract between competing railroads, and relating to traffic rates for the transportation of articles of commerce between the States, provided such contract by its direct effect produces a restraint of trade or commerce. * * *

But it is maintained that an agreement like the one in question on the part of the railroad companies is authorized by the Commerce Act, which is a special statute applicable only to railroads, and that a construction of the Trust Act (which is a general act) so as to include within its provisions the case of railroads, carries with it the repeal by implication of so much of the Commerce Act as authorized the agreement. * * *

The first answer to this argument is that, in our opinion, the Commerce Act does not authorize an agreement of this nature. It may not in terms prohibit, but it is far from conferring either directly or by implication any authority to make it.

Other important cases showing the applicability of the Sherman Law to railroads are the United States *v.* Joint Traffic Association;[1] Northern Securities Co. *v.* United States;[2] and United States *v.* Union Pacific Railroad Co.[3] The first two have already been discussed under other aspects of the question (see pp. 72–73, 85–86), while the second is also important in connection with forms of combination and is discussed below under the subject of holding companies. (See p. 103.)

Section 12. Farmers' combinations.

There has been, apparently, only one decision by the Federal courts touching the question whether farmers' combinations in restraint of interstate commerce are included within the prohibitions of the Sherman Act, and this case is not, perhaps, very clear on this point. Besides this, however, there is an obiter dictum in another case and a decision with regard to a State antitrust statute which supports the inference that farmers' combinations are not exempted.

STEERS *v.* UNITED STATES (192 FED., 1), CIRCUIT COURT OF APPEALS, 1911.—A farmer and two tenants delivered four hogsheads of tobacco at a railway station consigned to a person in another State, although a pool of tobacco growers in the vicinity, called the "Society of Equity" or the "Burley Society," had arranged to hold all tobacco at that time and opposed such sales. The farmer was notified by certain neighbors that he must not ship the tobacco or it would be destroyed, and they procured from him an order to take the tobacco from the station agent and return it to him. A large body of men recovered the tobacco from the station agent and informed him he must not ship any unpooled tobacco. A grand jury brought an indictment for violation of the Sherman Act against 12 persons, of whom 8 were convicted and fined. The defense apparently made no attempt to distinguish farmers' combinations from other combina-

[1] 171 U. S., 505 (1898). [2] 193 U. S., 197 (1904). [3] 226 U. S., 470 (1912).

tions. The court affirmed the judgments of conviction and the sentences imposed.

In the Danbury Hatters' case (Loewe *v.* Lawlor, 208 U. S., 274), which has been already discussed (see p. 93 above), the court made the statement that "organizations of farmers and laborers" were not exempted from the prohibitions of the law. Apparently, however, this was an obiter dictum so far as farmers' organizations are concerned.

A case arose, however, with relation to a State antitrust law, which was adjudicated by the Supreme Court of the United States and which throws some light on this subject. The facts in this case, and the essential part of the decision relating to this subject, were as follows:

CONNOLLY *v.* UNION SEWER PIPE CO. (184 U. S., 540), SUPREME COURT, 1902.—The pipe company brought an action in the Federal courts against one Connolly to obtain payment on his notes for the purchase of pipe. One defense set up was that the pipe company was a trust contrary to the statute of the State of Illinois of July 1, 1893, section 10 of which act provided that the purchaser of articles from a trust could plead this act in a suit to recover payment therefor in bar of such payment. The statute in section 1 prohibited trusts and other combinations to restrict trade, to prevent competition, to limit production, to fix prices, etc. In section 9 the following provision was made:

> The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser.

The court held that the defense made could not be allowed because this statute of the State of Illinois was unconstitutional.

The conclusions of the court on this matter were as follows (pp. 563–564):

> Returning to the particular case before us, and repeating or summarizing some thoughts already expressed, it may be observed that if combinations of capital, skill or acts, in respect of the sale or purchase of goods, merchandise or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and live stock are not also hurtful. Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the statute, criminals, and subject to a fine, if they combine their capital, skill or acts for the purpose of establishing, controlling, increasing or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturalists and live stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? It can not be said that the exemption made by the ninth section of the statute was of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to control prices for their own benefit; for it

can not be disputed that agricultural products and live stock in Illinois constitute a very large part of the wealth and property of that State.

We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary.

We therefore hold that the act of 1893 is repugnant to the Constitution of the United States, unless its ninth section can be eliminated, leaving the rest of the act in operation.

The Federal antitrust laws have been modified with respect to combinations among farmers, etc., by certain provisions of the Clayton Act which is described below. (See p. 138.)

Section 13. Forms of combination in restraint of trade.

The Sherman Law in section 1 prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade" in interstate commerce, etc. Thus, all kinds of contracts, combinations, and conspiracies are forbidden, if in restraint of interstate commerce. Leaving the question of interstate commerce aside, it is important to consider what are the chief devices, whether by contract, combination, or conspiracy, that have been practiced and held illegal under this law. Among the more important of these may be distinguished the following: (*a*) Agreements under written or oral contracts to fix prices, to restrict production, to divide markets, etc.; (*b*) consolidation of competing interests through "trusts," holding companies, or by complete merger of ownership. The latter class may be considered first. The "trust" form of combination was obsolescent at the time the act under consideration was passed, and there are no cases which need be considered under that head. The two other types of combination, however, are very important, namely, holding companies and mergers.

It should be very carefully noted that in respect to many of the agreements or practices herein set forth that the courts do not purport to have passed on them as isolated features.

Section 14. Mergers.

The most complete form of combination which has been held to be within the purview of the Sherman Act is the merger; that is, a combination which consolidates directly in a single ownership all or a large part of the property and business of the various competing interests comprehended in the combination. No case has yet been decided by the Supreme Court concerning a combination which was a

complete merger, i. e., in which all the properties brought under a common control were owned directly by one corporation. The most important instance of a partial merger was the American Tobacco Co., and the opinion of the court in this case is referred to below. Another important partial merger was that of the du Pont Powder Co. The final judicial decision in this instance was rendered in a circuit court, and the opinion in this case also is referred to below. The clearest case of a merger was decided in a district court (United States *v.* International Harvester Co.), which is also noted below. This case has been appealed to the Supreme Court and is now pending.

UNITED STATES *v.* AMERICAN TOBACCO CO. (221 U. S., 106), SUPREME COURT. 1911.—The American Tobacco Co., formed in 1890, was originally a combination of competing cigarette manufacturers having about 95 per cent of the total production of the United States, who transferred their manufacturing property and business to the American Tobacco Co. in exchange for its stock. This corporation then expanded its business into plug tobacco by purchasing the businesses of several manufacturers, who agreed not to reengage therein. Other more important plug makers were invited to join the combination, and on their refusal a price-cutting competitive policy was adopted which was ended by the purchase of some of them. The combination, with certain other plug manufacturers, organized the Continental Tobacco Co. in 1898, and conveyed to it the property and business pertaining to the plug branch of the business, taking in exchange most of the stock of the company; part of the stock of the Continental Tobacco Co., together with cash, was given in exchange for most of the stock of another important tobacco manufacturing concern—the P. Lorillard Co. From 1900 to 1902 two companies were organized which acquired dominating positions in the snuff and licorice businesses, respectively, while less important combinations were formed in the cigar and stogie branches, all of these being controlled through stock ownership by the combination. Further, in 1901 a few of the leading shareholders of the American Tobacco Co., and a few other large capitalists, organized the Consolidated Tobacco Co., a financial company merely, which acquired most of the common stock of the American Tobacco Co. in exchange for its bonds. In 1904 the American, Continental, and Consolidated Tobacco companies were all merged into a new corporation called the American Tobacco Co., this merger continuing to hold also the stocks of various other tobacco companies. The few capitalists who controlled the Consolidated Tobacco Co. thus became the dominating shareholders in this merger. Throughout the period from 1899 to the time of the suit, 1907, many millions were expended by the combination in buying out competing tobacco companies and closing down their plants, while their former owners agreed not to reenter their respective lines of business.

The court held that the combination was an attempt to monopolize and a monopolization of the tobacco trade, contrary to the Sherman Act, and said in part (pp. 181–183):

Considering then the undisputed facts which we have previously stated, it remains only to determine whether they establish that the acts, contracts, agreements, combinations, etc., which were assailed were of such an unusual and wrongful character as to bring them within the prohibitions of the law. That they were, in our opinion, so overwhelmingly results from the undisputed facts that it seems only necessary to refer to the facts as we have stated them to demonstrate the correctness of this conclusion. Indeed, the history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade by driving competitors out of business, which were ruthlessly carried out upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible. We say these conclusions are inevitable, not because of the vast amount of property aggregated by the combination, not because alone of the many corporations which the proof shows were united by resort to one device or another. Again, not alone because of the dominion and control over the tobacco trade which actually exists, but because we think the conclusion of wrongful purpose and illegal combination is overwhelmingly established by the following considerations:

(*a*) By the fact that the very first organization or combination was impelled by a previously existing fierce trade war, evidently inspired by one or more of the minds which brought about and became parties to that combination.

(*b*) Because, immediately after that combination and the increase of capital which followed, the acts which ensued justify the inference that the intention existed to use the power of the combination as a vantage ground to further monopolize the trade in tobacco by means of trade conflicts designed to injure others, either by driving competitors out of the business or compelling them to become parties to a combination—a purpose whose execution was illustrated by the plug war which ensued and its results, by the snuff war which followed and its results, and by the conflict which immediately followed the entry of the combination in England and the division of the world's business by the two foreign contracts which ensued.

(*c*) By the ever-present manifestation which is exhibited of a conscious wrongdoing by the form in which the various transactions were embodied from the beginning, ever changing but ever in substance the same. Now the organization of a new company, now the control exerted by the taking of stock in one or another or in several, so as to obscure the result actually attained, nevertheless uniform, in their manifestations of the purpose to restrain others and to monopolize and retain power in the hands of the few who, it would seem, from the beginning contemplated the mastery of the trade which practically followed.

(*d*) By the gradual absorption of control over all the elements essential to the successful manufacture of tobacco products, and placing such control in the hands of seemingly independent corporations serving as perpetual barriers to the entry of others into the tobacco trade.

(*e*) By persistent expenditure of millions upon millions of dollars in buying out plants, not for the purpose of utilizing them, but in order to close them up and render them useless for the purposes of trade.

(*f*) By the constantly recurring stipulations, whose legality, isolatedly viewed, we are not considering, by which numbers of persons, whether manufacturers, stockholders or employees, were required to bind themselves, generally for long periods, not to compete in the future. Indeed, when the results of the undisputed proof which

we have stated are fully apprehended, and the wrongful acts which they exhibit are considered, there comes inevitably to the mind the conviction that it was the danger which it was deemed would arise to individual liberty and the public well-being from acts like those which this record exhibits, which led the legislative mind to conceive and to enact the Antitrust Act, considerations which also serve to clearly demonstrate that the combination here assailed is within the law as to leave no doubt that it is our plain duty to apply its prohibitions.

Considering the form of remedy and the difficulties attendant thereon, the court said with reference to the extensive merger of ownership (pp. 185–186):

Because in this case it is obvious that a mere decree forbidding stock ownership by one part of the combination in another part or entity thereof, would afford no adequate measure of relief, since different ingredients of the combination would remain unaffected, and by the very nature and character of their organization would be able to continue the wrongful situation which it is our duty to destroy.

In connection with this decision it should be pointed out that the form of dissolution which was finally accepted by the court provided for an extensive splitting up into companies, specially created for this purpose, not only of the American Tobacco Co. but also of some of the chief subsidiary companies, such as the snuff company and the licorice company. (See pp. 18–21.) In other words, where a merger of property and business had been accomplished, the court provided that it should be divided among several independent companies in order to reestablish conditions in harmony with the law.

UNITED STATES *v.* E. I. DU PONT DE NEMOURS & Co. (188 Fed., 127), CIRCUIT COURT, 1911.—The United States brought suit to procure the dissolution of a combination of powder manufacturers. The facts and the decision in this case are shown in the following excerpt from the opinion of the court (pp. 151–152):

The record of the case now before us shows that from 1872 to 1902, a period of 30 years, the purpose of the trade associations had been to dominate the powder and explosives trade in the United States, by fixing prices, not according to any law of supply and demand, for they arbitrarily limited the output of each member, but according to the will of their managers. It appears, further, that although these associations were not always strong enough to control absolutely the prices of explosives, their purpose to do so was never abandoned. Under the last of the trade association agreements—the one dated July 1, 1896, and which was in force until June 30, 1904—the control of the combination was firmer than it had before been. Succeeding the death of Eugene du Pont in January, 1902, and the advent of Thomas Coleman du Pont and Pierre S. du Pont, the attempt was made to continue the restraint upon interstate commerce and the monopoly then existing by vesting, in a few corporations, the title to the assets of all the corporations affiliated with the trade association, then dissolving the corporations whose assets had been so acquired, and binding the few corporations owning the operating plants in one holding company, which should be able to prescribe policies and control the business of all the subsidiaries without the uncertainties attendant upon a combination in the nature of a trade association. That attempt resulted in complete success.

Much the larger part of the trade in black and smokeless powder and dynamite in the United States is now under the control of the combination supported by the

28 defendants above named. That combination is the successor of the combination in existence from 1896 to June 30, 1904. It is a significant fact that the trade association, organized under the agreement of July 1, 1896, was not dissolved until June 30, 1904. It had been utilized until that date by Thomas Coleman du Pont, Pierre S. du Pont, and Alfred I. du Pont in suppressing competition and thereby building up a monopoly. Between February, 1902, and June, 1904, the combination had been so completely transmuted into a corporate form that the trade association was no longer necessary. Consequently the trade association was dissolved, and the process of dissolving the corporations whose capital stocks had been acquired, and concentrating their physical assets in one great corporation, was begun. Before the plan had been fully carried out this suit was commenced. The proofs satisfy us that the present form of the combination is no less obnoxious to the law than was the combination under the trade association agreement, which was dissolved on June 30, 1904. The 28 defendants are associated in a combination which, whether the individual defendants were aware of the fact or not, has violated and still plans to violate both section 1 and section 2 of the antitrust act. We conclude that it is our plain duty to grant such a decree as will prevent and restrain further violations of the act.

UNITED STATES *v.* INTERNATIONAL HARVESTER CO. (214 Fed., 987), District Court, 1914.—Five of the leading manufacturers of harvesting machinery, who controlled the output of over 80 per cent of the business in the United States, conveyed their properties to the International Harvester Co., a corporation which had been organized for the purpose of taking over and operating the businesses. Subsequently, the plants and good will of several smaller competing factories were purchased and the manufacture of additional kinds of farm machinery was taken up. The Government brought suit against the International Harvester Co. as an illegal combination. The court held that the company from the beginning had been in violation of the Sherman Act.

The court said, in part (p. 994):

No weight is attached therefore to the means by which the combination was formed if a combination within the purview of the statutes was created. That it was a combination of five companies is clear. The fact that this combination took the form of a new corporation is immaterial. *United States* v. *American Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663; *United States* v. *E. I. Du Pont De Nemours & Co.* (C. C.) 188 Fed. 127.

Was this combination in restraint of trade? It substantially suppressed all competition between the five companies, and the restraint of competition between combining companies is as illegal as destruction of competition between them without combining.

Mr. Justice Hook, who concurred in the opinion of the court, filed a separate opinion, in which he said, in part (p. 1001):

I concur in the foregoing opinion. The International Harvester Company is not the result of the normal growth of the fair enterprise of an individual, a partnership or a corporation. On the contrary, it was created by combining five great competing companies which controlled more than 80 per cent. of the trade in necessary farm implements, and it still maintains a substantial dominance. That is the controlling fact; all else is detail.

This case has been appealed and is now pending.

Section 15. Holding companies.

The holding company as a device for combining competitive interests succeeded to the "trust" form of organization, as already described in Chapter I. (See pp. 8–9.) The holding company in its pure form is one which simply owns the stocks of the companies whose property and business are under its control. Most holding companies, however, own and operate directly a part of the property and business under their control. A few years after the enactment of the Sherman Law it became one of the principal methods of combining competitors. No authoritative decision by the Supreme Court was made with regard to its legality until the Northern Securities case was decided in 1904.

NORTHERN SECURITIES CO. *v.* UNITED STATES (193 U. S., 197), SUPREME COURT, 1904.—The facts in this case are more fully stated on page 73. More briefly they were as follows: Stockholders in two parallel and competing interstate railroads organized the Northern Securities Co. to acquire and hold the shares of the said railroads, and in consequence most of the shares of the said two railroad companies were so acquired. Most of the shareholders of the railroad companies exchanged their shares for shares of the Northern Securities Co. on an agreed basis. The Government brought suit to prevent the Northern Securities Co. from voting such shares, and to compel it to reexchange them for its own shares, etc.; also to enjoin the carrying out of the scheme of combination. The court held that this combination in the form of a holding company was in restraint of interstate commerce and contrary to the Sherman Act.

Justice Harlan, speaking for himself and three other justices, said in part (p. 338):

> But even if the State allowed consolidation it would not follow that the stockholders of two or more State railroad corporations, having *competing lines and engaged in interstate commerce*, could lawfully combine and form a distinct corporation to hold the stock of the constituent corporations, and, by destroying competition between them, in violation of the act of Congress, restrain commerce among the States and with foreign nations.

Justice Brewer in his concurring opinion said in part (p. 362):

> There was a combination by several individuals separately owning stock in two competing railroad companies to place the control of both in a single corporation. The purpose to combine and by combination destroy competition existed before the organization of the corporation, the Securities Company * * *. A corporation, while by fiction of law recognized for some purposes as a person and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business. In this case it was a mere instrumentality by which separate railroad properties were combined under one control. That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates.

STANDARD OIL CO. *v.* UNITED STATES (221 U. S., 1), SUPREME COURT, 1911.—The facts in this case have been already stated in connection with other topics. (See pp. 86, 90.) Briefly stated for the present purpose, the essential points in question were as follows: The Standard Oil Co. was a combination embracing most of the pipe-line, oil-refining, and oil-marketing business in the country, built up at first principally by the amalgamation of competing interests. These were organized under a common control through a deed of trust in 1882, and subsequently through a holding company, the Standard Oil Co. of New Jersey, which owned the stock of a large number of subsidiary companies controlled by the combination. When this form of organization was adopted the New Jersey company increased its authorized capital stock from $10,000,000 to $110,000,000. Its shares were issued to the former owners, or beneficial owners, of the shares of the subsidiary companies, which were in turn acquired by the holding company.

The court held that the series of acts by which the combination was formed, and in particular the holding company established in 1899, constituted a violation of both sections 1 and 2 of the Sherman Law. With more particular reference to the form of organizing the combination, the court said in part (pp. 72–75):

> Giving to the facts just stated the weight which it was deemed they were entitled to, in the light afforded by the proof of other cognate facts and circumstances, the court below held that the acts and dealings established by the proof operated to destroy the "potentiality of competition" which otherwise would have existed to such an extent as to cause the transfers of stock which were made to the New Jersey corporation and the control which resulted over the many and various subsidiary corporations to be a combination or conspiracy in restraint of trade in violation of the first section of the act, but also to be an attempt to monopolize and a monopolization bringing about a perennial violation of the second section.
>
> We see no cause to doubt the correctness of these conclusions, considering the subject from every aspect, that is, both in view of the facts established by the record and the necessary operation and effect of the law as we have construed it upon the inferences deducible from the facts, for the following reasons:
>
> (*a*) Because the unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the *prima facie* presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed, the whole with the purpose of excluding others from the trade and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce.
>
> (*b*) Because the *prima facie* presumption of intent to restrain trade, to monopolize and to bring about monopolization resulting from the act of expanding the stock of the New Jersey corporation and vesting it with such vast control of the oil industry, is made conclusive by considering (1) the conduct of the persons or corporations who

were mainly instrumental in bringing about the extension of power in the New Jersey corporation before the consummation of that result and prior to the formation of the trust agreements of 1879 and 1882; (2) by considering the proof as to what was done under those agreements and the acts which immediately preceded the vesting of power in the New Jersey corporation as well as by weighing the modes in which the power vested in that corporation has been exerted and the results which have arisen from it.

With reference to the decree of the court below, the opinion contained the following statement (pp. 79–80):

So far as the decree held that the ownership of the stock of the New Jersey corporation constituted a combination in violation of the first section and an attempt to create a monopoly or to monopolize under the second section and commanded the dissolution of the combination, the decree was clearly appropriate. And this also is true of section 5 of the decree which restrained both the New Jersey corporation and the subsidiary corporations from doing anything which would recognize or give effect to further ownership in the New Jersey corporation of the stocks which were ordered to be retransferred.

Section 16. Agreements to fix prices.

The most direct attempt at price enhancement has been by means of agreements to fix prices. Such agreements have been held to be illegal, as being in restraint of trade, and as attempts to monopolize, in so far as they relate to interstate commerce. These have existed among railroads as well as among manufacturing and trading concerns. They may be either sellers' or buyers' agreements—usually the former, though occasionally, as in the case of the beef packers (see p. 106), buyers have combined to depress purchase prices. The earliest instance of an agreement to fix prices held illegal by the Supreme Court under the Sherman Law was an agreement to fix the prices of railroad transportation.

UNITED STATES *v.* TRANS-MISSOURI FREIGHT ASSOCIATION (166 U. S., 290), SUPREME COURT, 1897.—The facts in the case have already been stated. (See p. 84.) For the present purpose it is sufficient to recall that an association of railway companies had made an agreement to fix the rates of transportation in an area comprising several States, under which members failing to maintain such rates were subject to fine. In the suit in equity brought by the Government it was sought to dissolve the association and enjoin the parties thereto from further action under the combination. The defendants claimed that the rates so fixed were reasonable. The court held, as already noted in the previous statement of the case, that the question of reasonableness did not enter. The court said (pp. 339, 341):

The claim that the company has the right to charge reasonable rates, and that, therefore, it has the right to enter into a combination with competing roads to maintain such rates, can not be admitted. The conclusion does not follow from an admission of the premise. What one company may do in the way of charging reasonable rates is radically different from entering into an agreement with other and competing

roads to keep up the rates to that point. If there be any competition the extent of the charge for the service will be seriously affected by that fact. * * * competition is allowed no play; it is shut out, and the rate is practically fixed by the companies themselves by virtue of the agreement, so long as they abide by it. * * *

The question is one of law in regard to the meaning and effect of the agreement itself, namely: Does the agreement restrain trade or commerce in any way so as to be a violation of the act? We have no doubt that it does. The agreement on its face recites that it is entered into "for the purpose of mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight traffic, both through and local." To that end the association is formed and a body created which is to adopt rates which, when agreed to, are to be the governing rates for all the companies, and a violation of which subjects the defaulting company to the payment of a penalty, and although the parties have a right to withdraw from the agreement on giving thirty days' notice of a desire so to do, yet while in force and assuming it to be lived up to, there can be no doubt that its direct, immediate and necessary effect is to put a restraint upon trade or commerce as described in the act.

UNITED STATES *v.* JELLICO MOUNTAIN COAL & COKE CO. ET AL. (46 FED., 432), CIRCUIT COURT, 1891.—This case was a suit in equity against the members of the "Nashville Coal Exchange," which was composed of coal-mining companies in Kentucky and Tennessee and coal dealers in Nashville, a combination formed "to establish prices on coal at Nashville, Tenn., and to change same from time to time, as occasion may require." The combination agreement provided a penalty for selling below the prices so fixed. The court held that this combination was in restraint of interstate commerce, and constituted also an attempt to monopolize the coal business between the State of Kentucky and Nashville, Tenn., basing its decision on the agreements to fix prices and not to deal with nonmembers, as the elements constituting restraint.

The court said (p. 436):

These provisions, so far as this combination could do so, fixed the lowest price of coal to consumers in and near Nashville at 13 cents per bushel, and prevented coal being sold there at a cheaper rate, no matter how much less it might cost in an open and unobstructed market. Nor is this all. The exchange ordains that "owners or operators of mines shall not sell or ship coal to any firm, person, or corporation in Nashville or West Nashville or East Nashville who are not members of this exchange, and dealers shall not buy coal from any one who is not a member of the exchange." The coal trade is confined, so far as the market supply is concerned, to transactions between the miner and dealer, the prices are fixed by them, and the miner and dealer only are eligible to membership. The miners of the concern can not sell to any dealer in or near Nashville who is not a party to the agreement, nor can such dealer purchase coal of any miner anywhere who is not a member of the body. The operations of both are confined within the membership. So far as Nashville is concerned, they can not go to cheaper or more favorable markets, or deal with those who would give more favorable terms. The restraint is positive and undeniable.

UNITED STATES *v.* SWIFT & CO. (196 U. S., 375), SUPREME COURT, 1905.—This was a suit in equity by the Government for an injunction against Swift & Co. and other packing companies controlling about 60 per cent of the trade in fresh meat in the United States. The

Government charged a combination of a dominant portion of the dealers in fresh meat throughout the United States not to bid against each other in the live-stock markets of the different States; to bid up prices for a few days in order to induce the cattlemen to send their stock to the stockyards; to fix prices at which they sell, and to that end to restrict shipments of meat when necessary; to establish a uniform rule of credit to dealers, and to keep a blacklist; to make uniform and improper charges for cartage; to get less than lawful rates from railroads to the exclusion of competitors; and to conspire with one another and with the railroads, and with others, to monopolize the supply and distribution of fresh meat throughout the United States. A demurrer to the declaration was overruled, the court holding that such a combination is within the prohibitions of the Sherman Act. In granting the preliminary injunction sought by the Government, the circuit court said (122 Fed., 534):

> Whatever combination has the direct and necessary effect of restricting competition, is, within the meaning of the Sherman act as now interpreted, restraint of trade.
>
> Thus defined, there can be no doubt that the agreement of the defendants to refrain from bidding against each other in the purchase of cattle, is combination in restraint of trade; so also their agreement to bid up prices to stimulate shipments, intending to cease from bidding when the shipments have arrived. The same result follows when we turn to the combination of defendants to fix prices upon, and restrict the quantities of meat shipped to their agents or their customers. Such agreements can be nothing less than restriction upon competition, and, therefore, combination in restraint of trade; and thus viewed, the petition, as an entirety, makes out a case under the Sherman act.

The Supreme Court affirmed the opinion of the lower court, basing its opinion on all the facts taken together, of which price fixing was an important element, and said in part (pp. 396 and 400):

> The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. * * *
>
> Under the act it is the duty of the court, when applied to, to stop the conduct. The thing done and intended to be done is perfectly definite: with the purpose mentioned, directing the defendants' agents and inducing each other to refrain from competition in bids. The defendants can not be ordered to compete, but they properly can be forbidden to give directions or to make agreements not to compete. See *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S., 211. The injunction follows the charge.

Section 17. Agreements to limit output.

Agreements to limit output have sought to accomplish as effectively the same end—higher prices—as the more direct methods of price fixing. To curtail production has been one of the objects of many association agreements.

GIBBS *v.* MCNEELEY (118 FED., 120), CIRCUIT COURT OF APPEALS, 1902.—The facts in this case have been already set forth. (See p. 78.) It is necessary here only to say that they relate to an association of manufacturers and dealers in red-cedar shingles in the State of Washington, formed for the purpose of controlling the production and price of such shingles, which were made only in that State but were principally sold and used in other States, and which, by its action in closing the mills of its members, had reduced the production and had also arbitrarily increased the prices at which the product was sold. This was held to be an unlawful combination under the Sherman Law. The court said (p. 127):

The combination in the case before the court is more than a combination to regulate prices; it is a combination to control the production of a manufactured article more than four-fifths of which is made for interstate trade, and to diminish competition in its production, as well as to advance its price. These features, we think, determine its object, and bring it under the condemnation of the law.

CRAVENS *v.* CARTER-CRUME CO. (92 FED., 479), CIRCUIT COURT OF APPEALS, 1899.—Manufacturers of woodenware, representing 80 per cent of the total product of the country, formed a combination for the purpose of restricting the production of wooden dishes throughout the country and keeping up the price thereof. To this end it was intended that all the factories would be brought under the control of a central organization—the National Mercantile Co.—which was to regulate the prices of the woodenware.

Cravens, a party to the combination contract, was guaranteed certain dividends by the Carter-Crume Co. for closing his factory for a year and performing other acts. He brought suit against the Carter-Crume Co. to recover the amount of the dividends so guaranteed to him. The court held that, in the case of articles in common use at least, the contract could not be enforced, since illegal under the Sherman Act. The court said (p. 485):

The parties who were engaged in these transactions, of whom the plaintiff was one, representing 80 per cent of the total product, undertook to, and did in fact, form a combination for the purpose of restricting the production of wooden dishes throughout the country and keeping up the prices thereof. The articles to which this combination had reference were articles in common use. The plaintiff's contracts were part of the means employed for effecting the common object, and he secured the means of sharing in the profits expected to be gained through the combination. To this end all the factories were expected to be brought under the control of the National Mercantile Company, which was to regulate the prices. The plaintiff testified that it was the purpose to close his factory, and not run it at all. He further testified that it was the purpose "to get all the factories in line," in order "to maintain prices." He was guaranteed $9,000 for closing his factory for a year, and the contract included all the dish machines that might come into his possession or control, thus disabling himself from manufacturing, and he obligated himself not to sell any wood dishes to any other person, directly or indirectly, during the continuance of the contract. It is manifest that it was the expectation, and that the parties intended, to get a

sufficiently large number of manufacturers into the combination to practically accomplish their purpose. We can not doubt that such a combination, for such purposes, was opposed to public policy, and therefore unlawful.

Section 18. Agreements to apportion output.

Agreements to apportion output differ from agreements to limit output in that the former specifically allot the quantities to be produced or sold by the several members of the combination. In the second case cited (see p. 110)—that of the Window Glass Jobbers—there was not only an allotment of the manufacturers' output but also of the quantities which the several jobbers could buy.

UNITED STATES *v.* CHESAPEAKE & OHIO FUEL CO. (115 FED., 610), CIRCUIT COURT OF APPEALS, 1902.—By a contract between the Chesapeake & Ohio Fuel Co. and an association composed of 14 persons, firms, and corporations independently engaged in producing coal and coke in a certain district, the company was to handle for a term of years the entire output of the members of the association intended for the western market, and bound itself not to sell the product of any competitors. The association had an executive committee which from time to time fixed the minimum price at which the coal and coke should be sold, and the company agreed to pay such price, to obtain as large a profit as possible, and to account to the association for the proceeds, deducting its compensation, which was not to exceed 10 cents per ton. The amount of product to be furnished by each member of this association was also to be fixed by the executive committee and each was to receive payment at the same rate, to be based upon the average price realized for the particular grade furnished during the current month. It was stipulated that other producers of coal might become parties to the contract by a majority vote of the members of the association. This was a suit in equity by the Government to annul the contract, to enjoin its performance and to dissolve the combination as illegal under the Sherman Act. The court held that the contract and the combination of the defendants thereunder were in restraint of trade and commerce among the several States, and that such trade had in fact been restrained, in the performance of the contract. A decree was entered enjoining the defendants and each of them from selling or shipping, under the contract coal or coke, into any State other than the State in which they reside, and dissolving the combination of the defendants under the contract.

The court said in part (p. 621):

A consideration of these provisions, assuming that the contract relates to interstate commerce, would seem to make plain the violation of the statute of 1890. Here are 14 dealers who have neither formed a corporation nor a partnership, but have limited to the terms of this agreement their rights for five years in the mining and shipping of coal upon one of their main outlets to the market. They have restricted their right

to produce coal for such shipment to the amount designated by the committee. They have restricted sales to this purchaser to a price to be fixed by the committee. They have eliminated competition in the market among themselves. They have restricted the purchaser so that he may not buy from others in competition with themselves. If we correctly interpret the decisions of the supreme court, these provisions clearly restrain the freedom of interstate commerce, which it is the purpose of this statute to maintain unfettered by such contracts and combinations. * * *

WHEELER-STENZEL CO. *v.* NATIONAL WINDOW GLASS JOBBERS' ASSOCIATION (152 FED., 864), CIRCUIT COURT OF APPEALS, 1907.—The Wheeler-Stenzel Co., a wholesale dealer and jobber in window glass in Boston, doing an interstate business in that product, commenced an action at law for treble damages under the Sherman Act against the National Window Glass Jobbers' Association, and in its declaration alleged in substance that the National Window Glass Jobbers' Association was a corporation controlled by certain wholesale dealers in window glass doing more than 75 per cent of the total window-glass business in the United States; that its business during the time complained of was purchasing or obtaining contracts for the purchase of window glass from manufacturers in certain specified States for the benefit of certain jobbers and wholesale dealers doing business in other States and specified in a list set forth; that such wholesale dealers owned a large majority of the stock in the association; that the American Window Glass Co. owned and operated glass factories in several States and delivered its product to wholesale dealers in the several States and produced more than 70 per cent of the window glass manufactured in the United States; that prior to the acts complained of the wholesale dealers were uncombined; that the association entered into a contract with the American Window Glass Co. and such wholesale dealers agreeing among other things to restrict the sale of all glass manufactured by the said company to the wholesale dealers in the combination, except at prices higher than those charged wholesalers in the combination, to restrict the quantity to be purchased by each such wholesaler, to refuse to purchase any window glass from any manufacturer other than the American Window Glass Co. except at prices below the price charged by it to such wholesalers, to arbitrarily fix prices to retailers, to authorize the American Window Glass Co. to arbitrarily determine the quantity of glass to be purchased by each such wholesaler, to refuse to purchase at any price from any manufacturer who did not close his factory and restrict his output as he might be arbitrarily directed by the American Window Glass Co.; that rules and regulations were established forbidding wholesalers in the combination from selling to other wholesalers at prices lower than the price fixed; that the territory for each wholesaler in the combination was fixed; that since the combination was effected the American Window Glass Co. had continually refused to sell any window glass to the Wheeler-Stenzel Co. except at unreas-

onable prices largely in excess of the prices charged to the wholesalers in the combination; that prior to the combination the Wheeler-Stenzel Co.'s profit was $100,000 annually; that by reason of the combination the said company lost a very large part of its trade. The defendant demurred. The circuit court sustained the demurrer. The case was then taken to the Circuit Court of Appeals by writ of error. The judgment of the circuit court was reversed. The court held that the declaration charged a contract or combination in restraint of interstate commerce in violation of the Sherman Act.

The court said in part (pp. 870–871):

> We think, in the language quoted, there is sufficiently averred the existence of a contract or combination, to which the defendant was a party, which, by its necessary operation, was in restraint of interstate trade and commerce in window glass. It was obviously designed to destroy or minimize competition between certain wholesalers and jobbers in window glass, alleged to be 75 per cent of the whole number so engaged in the United States, and, in the language of the Supreme Court, "to destroy or restrict free competition in interstate commerce is to restrain such commerce."
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> * * * * * * * *
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> There is something more, however, set forth in the declaration affecting the character and operation of this contract. Prices to retail dealers were to be arbitrarily fixed by those wholesale dealers, to which prices they were all required to conform. The quantity of glass to be purchased by each of said wholesale dealers was to be arbitrarily determined by the American Window Glass Company, and they were to be prohibited from purchasing from any manufacturer who should not close his factories and restrict the output of glass when and as required so to do by the American Window Glass Company. These stipulations clearly tended toward the creation of a monopoly, and if adhered to and carried out, manifestly restricted the scope of competition in the commodity referred to. It may be quite true, that such an agreement would have been valid at common law, or if invalid as to the parties, would not have been illegal, but the act of Congress has affected it with illegality, so far as the trade or commerce restrained by it is interstate in its character. We conclude, therefore, that the contract or combination set out in the declaration is one in violation of the first section of the Antitrust Act, and that an action properly accrues under the seventh section to any one who has been injured in his business or property by reason thereof.

UNITED STATES TOBACCO CO. *v.* AMERICAN TOBACCO CO. (163 Fed., 701), CIRCUIT COURT, 1908.—This was an action for treble damages by the United States Tobacco Co., a manufacturer of plug tobacco engaged in interstate commerce. It alleged in its complaint in substance as follows: Two subsidiary companies of the American Tobacco Co., namely, MacAndrews & Forbes Co. and J. S. Young Co., were manufacturers of licorice paste and controlled more than 85 per cent of the trade therein. These manufacturers of licorice paste entered into a combination eliminating competition, fixing arbitrary and noncompetitive prices for paste, and induced certain competitors to fix arbitrary prices in excess of the normal and reasonable prices, and apportioned their interstate trade and arbitrarily fixed the amount of business they should do, and also agreed with another manufacturer, John D. Lewis, that the latter should

restrict his output to a fixed quantity under a penalty. Demurrer to the complaint was overruled. The court held that the agreement constituted an interference with interstate commerce prohibited by the Sherman Act, and said in part (p. 707):

As I look at this complaint, the most material allegation is the one wherein it is charged that John D. Lewis contracted and agreed with the J. S. Young Company that he would not sell more than 1,000,000 pounds of such licorice paste during the year 1904, nor more than 50,000 pounds additional during each year for five years from December 31, 1903, so that the total production of Lewis should not be more than 1,200,000 pounds during the year 1908.

Section 19. Agreements to divide territory.

ADDYSTON PIPE & STEEL CO. *v.* UNITED STATES (175 U. S., 211), SUPREME COURT, 1899.—The defendants, manufacturers of cast-iron pipe, had made an agreement, one of the provisions of which was that certain cities were reserved to certain members of the combination. (For statement of facts, see also p. 76). For instance, the Chattanooga Foundry & Pipe Works were to "handle Chattanooga, Tenn., and New Orleans, La., furnishing all gas and water pipe in above-named cities." When there was a call for bids from one of these cities the price was agreed on by the members of the combine; the member to whom the city was reserved bid the agreed price; to preserve the appearance of competition, the other members bid higher prices; the member to whom the town was reserved got the contract. The Supreme Court said in its opinion (p. 241):

If dealers in any commodity agreed among themselves that any particular territory bounded by state lines should be furnished with such commodity by certain members only of the combination, and the others would abstain from business in that territory, would not such agreement be regarded as one in restraint of interstate trade? If the price of the commodity were thereby enhanced, (as it naturally would be,) the character of the agreement would be still more clearly one in restraint of trade. Is there any substantial difference where, by agreement among themselves, the parties choose one of their number to make a bid for the supply of the pipe for delivery in another State, and agree that all the other bids shall be for a larger sum, thus practically restricting all but the member agreed upon from any attempt to supply the demand for the pipe or to enter into competition for the business? Does not an agreement or combination of that kind restrain interstate trade, and when Congress has acted by the passage of a statute like the one under consideration, does not such a contract clearly violate that statute?

UNITED STATES *v.* STANDARD OIL CO. OF NEW JERSEY (221 U. S., 1), SUPREME COURT, 1911.—For statement of facts in this case, see page 86. The Supreme Court noted among the facts showing the intent to monopolize the trade in oil (p. 77)—

The system of marketing which was adopted by which the country was divided into districts and the trade in each district in oil was turned over to a designated corporation within the combination and all others were excluded.

WHEELER-STENZEL CO. *v.* NATIONAL WINDOW GLASS JOBBERS' ASSOCIATION (152 FED., 864), CIRCUIT COURT OF APPEALS, 1907.—The facts in this case are stated above (pp. 110, 111). Division of territory was one of the features of the illegal contract, though it is not one that the court called special attention to in its opinion.

UNITED STATES TOBACCO CO. *v.* AMERICAN TOBACCO CO. (163 FED., 701), CIRCUIT COURT, 1908.—The facts in this case are stated above (pp. 111–112). Apportionment of customers, not territorially but individually, was one of the factors of the agreement which in its entirety was found to be illegal.

Section 20. Agreements to divide earnings or profits.

ADDYSTON PIPE & STEEL CO. *v.* UNITED STATES (175 U. S., 211), SUPREME COURT, 1899.—As is explained in the preceding section (p. 112), this case dealt with a combination of cast-iron pipe manufacturers. Certain cities were reserved for certain members of the combine; the combine, however, fixed the price on every contract, and also fixed a bonus to be paid into a pool by the member to whom the contract was assigned, which bonus was afterwards divided. In territory covered by the combination, but outside of the reserved cities, when the price on a contract had been fixed by the combination, the contract was assigned to the member who would pay the highest bonus for the privilege of filling it at the price. This bonus also went into the pool for subsequent division. The Supreme Court quoted with approval the following passage from the opinion of the Circuit Court of Appeals (p. 237):

> The defendants were by their combination therefore able to deprive the public in a large territory of the advantages otherwise accruing to them from the proximity of defendants' pipe factories and, by keeping prices just low enough to prevent competition by Eastern manufacturers, to compel the public to pay an increase over what the price would have been if fixed by competition between defendants, nearly equal to the advantage in freight rates enjoyed by defendants over Eastern competitors. The defendants acquired this power by voluntarily agreeing to sell only at prices fixed by their committee and by allowing the highest bidder at the secret "auction pool" to become the lowest bidder of them at the public letting. Now, the restraint thus imposed on themselves was only partial. It did not cover the United States. There was not a complete monopoly. It was tempered by the fear of competition and it affected only a part of the price. But this certainly does not take the contract of association out of the annulling effect of the rule against monopolies.[1]

CONTINENTAL WALL PAPER CO. *v.* LOUIS VOIGHT & SONS CO. (212 U. S., 227), SUPREME COURT, 1909.—In this case (see p. 91) there was a division of profits through the device of a central company whose shares were distributed among the members of the combine in proportion to their production during the preceding year. The whole output of the members was sold actually or nominally to the central com-

[1] 85 Fed., 292-293.

pany in such a way that practically the whole profit accrued to it. The result was that profits were finally divided, not with any relation to the current business of the several members of the combine, but in proportion to their output during the year before the combine was formed. The Supreme Court said (p. 255):

That the combination represented by the plaintiff company is within the prohibitions of the above act of Congress is clear from the facts admitted by the demurrer. We assume, therefore, without discussion—for discussion is unnecessary—that there is a combination, of which the Continental Wall Paper Company is the representative, and that, in violation of that act, such combination was formed with the intent, and will have the effect, directly, to restrain as well as monopolize trade and commerce among the several States and with foreign nations as involved in the manufacture, sale and transportation of wall paper among the several States and with foreign nations.

UNITED STATES *v.* MACANDREWS & FORBES CO. (149 FED., 823), CIRCUIT COURT, 1906.—An agreement that a subsidiary of the American Tobacco Co., manufacturing licorice paste, should receive part of the profits of an outside manufacturer thereof, was one of the elements of illegality considered in this case. (See p. 111.)

Section 21. Corners.

Attempts to "corner the market," for the purpose of raising the price of the commodity so cornered, have been held by the Supreme Court to be illegal under the Sherman Act.

UNITED STATES *v.* PATTEN (226 U. S., 525), SUPREME COURT, 1913.—James A. Patten and others were indicted for alleged violation of the Sherman Law. The indictment charged in substance that Patten and others had entered into a combination agreement to severally purchase enough cotton to enable them to control the price of cotton, and were engaged in a conspiracy in restraint of interstate commerce by doing what is commonly called running a corner in that commodity. The important question raised by the defendant's demurrer to the indictment was whether a conspiracy to run a corner in the available supply of a staple commodity, such as cotton, normally a subject of trade and commerce among the States, and thereby to enhance artificially its price throughout the country and to compel all who have occasion to obtain it to pay the enhanced price or else to leave their needs unsatisfied is within the terms of section 1 of the Sherman Act.

The circuit court answered this question in the negative. The Supreme Court of the United States reversed the decision of the court below by answering this question in the affirmative. The Supreme Court said in part (p. 541):

Section 1 of the act, upon which the counts are founded, is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints, as where

persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce or restrict the common liberty to engage therein. * * *

It may well be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it also operates to thwart the usual operation of the laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition.

* * * * * * *

It was a conspiracy to run a corner in the market. The commodity to be cornered was cotton, a product of the Southern States, largely used and consumed in the Northern States. It was a subject of interstate trade and commerce, and through that channel it was obtained from time to time by the many manufacturers of cotton fabrics in the Northern States. The corner was to be conducted on the Cotton Exchange in New York City, but by means which would enable the conspirators to obtain control of the available supply and to enhance the price to all buyers in every market of the country. This control and the enhancement of the price were features of the conspiracy upon the attainment of which it is conceded its success depended. Upon the corner becoming effective, there could be no trading in the commodity save at the will of the conspirators and at such price as their interests might prompt them to exact. And so, the conspiracy was to reach and to bring within its dominating influence the entire cotton trade of the country.

Bearing in mind that such was the nature, object and scope of the conspiracy, we regard it as altogether plain that by its necessary operation it would directly and materially impede and burden the due course of trade and commerce among the States and therefore inflict upon the public the injuries which the Anti-trust Act is designed to prevent.[1]

Section 22. Patents—Use in violation of Sherman Law.

NATIONAL HARROW CO. *v.* HENCH (83 FED., 36), CIRCUIT COURT OF APPEALS, 1897. Several manufacturers of harrows under various United States patents assigned to the National Harrow Co. the patents severally owned by them, together with good will, agreeing among other things not to be interested in the manufacture or sale of such harrows except as agents or licensees of said corporation. The National Harrow Co. issued licenses to the several manufacturers, subject to uniform terms and conditions; its licensees manufactured and sold at least 90 per cent of such harrows made in the United States. The licenses so issued prohibited, among other things, the cutting of prices, and provided that the licensees should not sell other harrows than those authorized by the licenses. Hench and Dromgold, parties to the arrangement, sold harrows in violation of the terms of the licenses issued to them. This was a suit in equity by the Harrow company against Hench and Dromgold for an injunction, for specific performance of said license contracts and for an accounting. As a defense to the suit Hench and Dromgold pleaded that the license contracts were in unreasonable restraint of trade and were a part of an

[1] 226 U. S., 541-543.

unlawful combination to destroy competition and maintain high prices. The relief prayed for was denied (76 Fed., 667) and an appeal was taken to the Circuit Court of Appeals. The judgment of the circuit court was affirmed. The court held that the arrangement was an unlawful combination in restraint of trade.

It will be perceived that the corporation through whose instrumentality the purposes of the combination are effected is simply clothed with the legal title to the assigned patents, while the several assignors are invested with the exclusive right to manufacture and sell their old style of harrows under their own patents; but all of them must sell at uniform prices and upon the same terms, without respect to cost or the merits of their respective styles of harrows, and all the members of the combination are strictly forbidden to manufacture or sell any other style or kind of float spring-tooth harrow than they are thus licensed to make and sell. * * *

It is true that a patentee has the exclusive control of his invention during the life of the patent. He may practice the invention or not, as he sees fit, and he may grant to others licenses upon his own terms. But where, as was the case here, a large number of independent manufacturing concerns are engaged in making and selling, under different patents and in various forms, an extensively used article, competition between them is the natural and inevitable result, and thereby the public interest is promoted. Therefore, a combination between such manufacturers, which imposes a widespread restraint upon the trade, and destroys competition, is as injurious to the community, and as obnoxious to sound public policy, as if the confederates were dealing in unpatented articles. * * * I am constrained to regard the license contracts sued on as part of an illegal combination, and in unwarrantable restraint of trade. I must, therefore, deny the plaintiff the relief sought.[1]

STANDARD SANITARY MANUFACTURING CO. *v.* UNITED STATES (226 U. S., 20), SUPREME COURT, 1912.—The Standard Sanitary Manufacturing Co. and 15 other manufacturers of sanitary enameled ironware combined in the form of an association. Certain patents for enameling devices were assigned to one Wayman, secretary of the association, who issued licenses to the various manufacturers, members of the association, to manufacture such ware. Prior to this such manufacturers were independent and competitive. By agreements they subjected themselves to certain rules and regulations, among others not to sell their product to the jobbers except at a price fixed not by competitive trade conditions, but by the decision of a committee of six of their number, of which Wayman was chairman, and sale zones were established and prices fixed in each of them. A jobber could not obtain enameled ware from any manufacturer who was in the combine unless he entered the combination, and the condition of entry was not to resell to plumbers except at prices fixed in the jobber's license agreement. The potency of the scheme was established by the cooperation of 85 per cent of the manufacturers, and their fidelity to it was secured not only by trade advantages but by a provision for the return of 80 per cent of the royalties if the agreement was faithfully observed. The jobbers also were entitled to certain rebates for the faithful observance of their engagements.

[1] 76 Fed., 669-670.

It was testified that 90 per cent of the jobbers in number and more than 90 per cent in purchasing power joined the combination. This was a suit in equity by the Government to dissolve the alleged combination upon the grounds that it was a violation of the Sherman Act. A decree was entered in favor of the Government in the circuit court, and on appeal to the Supreme Court of the United States the decree was affirmed. The court held that a trade agreement involving the right of all parties thereto to use a certain patent which transcends what is necessary to protect the use of the patent or the monopoly thereof as conferred by law and which controls the output and the price of goods manufactured by all those using the patent, is illegal under the Sherman Act. The court said in part (pp. 48–49):

> The agreements clearly, therefore, transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman law. * * *
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> The agreements in the case at bar combined the manufacturers and jobbers of enameled ware very much to the same purpose and results as the association of manufacturers and dealers in tiles combined them in *Montague & Co.* v. *Lowry*, 193 U. S. 38, which combination was condemned by this Court as offending the Sherman law. The added element of the patent in the case at bar cannot confer immunity from a like condemnation, for the reasons we have stated. * * * Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained.

Section 23. Agreements to fix resale prices.

Agreements to fix resale prices differ from ordinary agreements of competitors to fix prices, in that the manufacturer fixes the price at which the jobbers or retailers shall sell the articles bought from him. Such resale agreements are common in many lines of industry. The courts have passed upon some of them, usually in connection with other illegal features of contracts in question, but frequently pointing out the fixing of resale prices as an important element in the restraint or monopoly passed upon. Many cases concerning resale prices have been adjudicated under the patent law, but these are not considered here, inasmuch as this section is confined solely to the interpretation of the Sherman Act with respect to resale prices.

Agreements to fix resale prices in a number of cases have been held to be illegal under the Sherman Law.[1]

CONTINENTAL WALL PAPER CO. *v.* LOUIS VOIGHT & SONS CO. (212 U. S., 227), SUPREME COURT, 1909.—The facts in this case have been already stated. (See p. 91.) It will be recalled that the Continental Wall Paper Co., a combination of manufacturers of wall paper comprising 98 per cent of the production and sales of wall paper in the United

[1] Certain recent decisions of inferior Federal courts regarding certain methods of maintaining resale prices are not noted here because made subsequent to Mar. 15, 1915. (See footnote on p. 72.)

States, made agreements with the jobbers of wall paper by which the latter agreed to sell the goods purchased at a price fixed by the combination, and to patronize exclusively the members of the combination. The Continental Wall Paper Co., under this contract, sued a jobber for wall paper furnished. The Supreme Court held that the Wall Paper company could not recover, since the contract was part of an illegal combination, quoting with approval (p. 256) the opinion of the Circuit Court of Appeals to the effect that—

> The jobbers and wholesalers, who were to be coerced into contracts to buy their entire demands from the Continental Wall Paper Company or be driven out of business, were in every State. Before the combination, each of the combining companies was engaged in both State and interstate commerce. The freedom of each, with respect to prices and terms, was restrained by the agreement and interstate commerce directly affected thereby, as well as by the enhancement of prices which resulted. A more complete monopoly in an article of universal use has probably never been brought about.[1]

The Supreme Court in affirming the decision of the Circuit Court of Appeals said (pp. 266–267):

> Upon the whole case, and without further citation of authorities, we adjudge, upon the admitted facts, that the combination, represented by the plaintiff in this case, was illegal under the Antitrust Act of 1890; that it is to be taken as one intended, and which will have the effect directly, to restrain and monopolize trade and commerce among the several States and with foreign States; and that the plaintiff can not have a judgment for the amount of the account sued on, because, for the reasons we have stated, such a judgment would, in effect, aid the execution of the agreements which constituted that illegal combination.

HARTMAN *v.* JOHN D. PARK & SONS' CO. (153 FED., 24), CIRCUIT COURT OF APPEALS, 1907.—In this case the manufacturer of a proprietary medicine sold the same to wholesale druggists under a contract which bound the latter to maintain certain resale prices, and to retail druggists under a retail-price agreement which bound the retailers to sell at fixed prices. These contracts were held to be illegal under the Sherman Law. The court said (pp. 33, 42):

> * * * We are * * * unable to discover any legal or economic reason which justly exempts such articles when made from all of the rules of the common law which forbid unreasonable restraints in trade and from the Antitrust Act of Congress in so far as trade in the prepared medicine is the subject of interstate commerce. * * *
>
> The plain effect of the "system of contracts," the purposed relation of each to every other being confessed by the very description of the method of carrying on business stated in the bill, is, first, to destroy all competition between jobbers or wholesale dealers in selling complainant's preparations. Complainant restrains himself by agreeing to sell at only one price and to only such persons as will sign one of his system of contracts. The contracting wholesalers or jobbers covenant that they will sell to no one who does not come with complainant's license to buy, and that they will not sell below a minimum price dictated by complainant. Next, all competition between retailers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby

[1] 148 Fed., 947.

he covenants not to sell to any one who proposes to sell again unless the buyer is authorized in writing by the complainant, and not to sell at less than a standard price named in the agreement. Thus all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus a combination between the manufacturer, the wholesalers, and the retailers to maintain prices and stifle competition has been brought about.

DR. MILES MEDICAL CO. *v.* JOHN D. PARK & SONS' CO. (220 U. S., 373), SUPREME COURT, 1911.—The Dr. Miles Medical Co. sought an injunction to prevent Park & Sons' Co. from selling the Miles medicines at cut rates, on the ground of a contract between the parties by which the resale prices were fixed. The court held that this provision of the contract was repugnant to the Sherman Act, and said, in part (pp. 394, 407–408):

The complainant, a manufacturer of proprietary medicines which are prepared in accordance with secret formulas, presents by its bill a system, carefully devised, by which it seeks to maintain certain prices fixed by it for all the sales of its products both at wholesale and retail. Its purpose is to establish minimum prices at which sales shall be made by its vendees and by all subsequent purchasers who traffic in its remedies. Its plan is thus to govern directly the entire trade in the medicines it manufactures, embracing interstate commerce as well as commerce within the States respectively. * * *

The bill asserts the importance of a standard retail price and alleges generally that confusion and damage have resulted from sales at less than the prices fixed. But the advantage of established retail prices primarily concerns the dealers. The enlarged profits which would result from adherence to the established rates would go to them and not to the complainant. It is through the inability of the favored dealers to realize these profits, on account of the described competition, that the complainant works out its alleged injury. If there be an advantage to a manufacturer in the maintenance of fixed retail prices, the question remains whether it is one which he is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they sell. As to this, the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant can not be regarded as sufficient to support its system.

But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer. * * *

The complainant's plan falls within the principle which condemns contracts of this class. It, in effect, creates a combination for the prohibited purposes. * * *

Section 24. The Sherman Act not void for uncertainty.

Since the decisions of the Supreme Court in the Standard Oil and Tobacco cases, it has frequently been urged that the Sherman Anti-trust Act is unconstitutional in that it is too vague and indefinite to create a criminal offense. This objection was disposed of by the Supreme Court in the following case.

NASH *v.* UNITED STATES (229 U. S., 373), SUPREME COURT, 1913.—An indictment returned in the circuit court against the American Naval Stores Co., the National Transportation & Terminal Co., and six individuals charged a conspiracy in restraint of trade and a conspiracy to monopolize trade contrary to the Sherman Act. A demurrer questioning both the validity of the penal provisions of the act and the sufficiency of the indictment was overruled. Five individual defendants were found guilty, fined, and sentenced to three months' imprisonment; this judgment being affirmed by the Circuit Court of Appeals. A writ of certiorari was granted by the Supreme Court which said in part (pp. 376–378):

> The objection to the criminal operation of the statute is thought to be warranted by *The Standard Oil Co.* v. *United States*, 221 U. S. 1, and *United States* v. *American Tobacco Co.*, 221 U. S. 106. Those cases may be taken to have established that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade. 221 U. S. 179. And thereupon it is said that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. The kindred proposition that "the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty," is cited from the late Mr. Justice Brewer sitting in the Circuit Court. *Tozer* v. *United States*, 52 Fed. Rep. 917, 919.
>
> But apart from the common law as to restraint of trade thus taken up by the statute the law is full of instances where a man's fate depends upon his estimating rightly, that is, as the jury subsequently estimate it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. * * *
>
> We are of opinion that there is no constitutional difficulty in the way of enforcing the criminal part of the act.

The judgment of the lower court was reversed on the ground of error in the charge to the jury and the case is pending.

Section 25. Character of judicial proceedings under the act.

Judicial proceedings under the Sherman Law may be divided into five broad classes: (1) Criminal prosecutions; (2) suits in equity by the Government; (3) condemnation proceedings by the Government with respect to goods transported in interstate commerce; (4) actions by private parties for treble damages; (5) actions at law or suits in equity between private parties where the law has been pleaded in defense, or where relief has been affirmatively sought from restraints imposed by agreements.

CRIMINAL PROCEEDINGS.—Indictments under the act have charged conspiracies in restraint of trade or commerce, or monopolizing or attempting to monopolize the same. The facts alleged in indictments have differed widely. Fixing prices and limiting and apportioning output, taken together, have been the basis of indictments in some cases; in others the employment of alleged unfair or

oppressive methods of competition have been charged as constituting evidence of an intent to violate the law. Among the acts of competition which have been complained of are the following: (1) Cutting prices, in some cases even below the cost of production, for the purpose of injuring competitors; (2) attempting to bribe employees of competitors to obtain information concerning their business; (3) bribing employees of transportation and express companies to disclose secrets as to competitors' shipments; (4) knowingly making false statements for the purpose of injuring competitors; (5) securing the product of competitors and advertising it at greatly reduced prices to injure the reputation of the product; (6) threatening or engaging in persecutive litigation to harass competitors or their patrons; (7) using bogus independent concerns to obtain secrets of competitors; (8) inducing employees of competitors to leave their service for the purpose of embarrassing them and restraining their trade; (9) refusing to sell to persons who handle the product of competitors.

The indictments alleging acts of competition as evidence of an intent to restrain or monopolize trade or commerce have not depended on any single practice to show a violation of the law, but have set out a number of such practices. In several cases of this character demurrers to the sufficiency of the indictments have been overruled, the court holding that the acts set forth, if proven, were sufficient to constitute a violation of the law. Other indictments have depended on such direct restraints of trade as fixing prices and limiting output. The members of a number of manufacturers' associations which fixed prices and limited and apportioned among themselves the production of various kinds of wire have been indicted, and on pleas of nolo contendere heavy fines imposed. A prosecution for a conspiracy to run a corner on the New York Cotton Exchange was successful, as also one against members of the Society of Equity for preventing the shipment in interstate commerce of the tobacco of nonmembers.[1] The members of labor unions have likewise been convicted for conspiracies to restrain trade.

Eighty-four indictments have been returned under the act. In 6 of these a verdict of guilty was secured; in 5 a verdict of not guilty was returned; in 10 demurrers to the indictments were sustained or the indictment quashed; in 28 cases pleas either of guilty or nolo contendere were entered, and sentences of fine or imprisonment imposed. In only one case, however, has a prison sentence been imposed and served, and this was on a plea of guilty. In several other cases prison sentences have been imposed, but the cases are now pending on appeal. Seventeen prosecutions have been dismissed by the Government, or judgments for the Government in the lower court have been reversed and the cases dismissed; and 18 criminal cases remain to be finally disposed of.

[1] See pp. 96, 114.

In addition to indictments, there have been a number of prosecutions for criminal contempt. Among the more important of these was the conviction of certain members of the Southern Wholesale Grocers' Association for violations of a consent decree entered in a suit in equity by the Government. Convictions were obtained and fines imposed in this case. (See pp. 488, 491.)

SUITS IN EQUITY BY THE GOVERNMENT.—Eighty-seven suits in equity have been instituted by the Government under the act. The more important of these suits have been for the dissolution of combinations in corporate form or of associations alleged to be in violation of the act. A large number of bills, however, have prayed for injunctions against violations of the act by individuals or corporations, or have sought to enjoin the further performance of contracts or agreements in restraint of trade.

Of the suits brought, judgments have been had in favor of the Government in 29 cases; in 13, decisions adverse to the Government have been rendered, or the bills have been dismissed by the Government or the cases allowed to rest after the bills were filed or the judgments on demurrer were rendered in favor of the Government. Consent decrees have been entered in 15 suits, and 30 suits are now pending.

CONDEMNATION PROCEEDINGS.—Only one case has been brought by the Government to condemn property seized in the course of transportation from one State to another. In this instance, 175 cases of cigarettes were seized, but were subsequently released under bond and the case ultimately dismissed.

ACTIONS FOR TREBLE DAMAGES.—Fifty-three actions for treble damages have been brought by private parties under section 7 of the Antitrust Act.[1] The results of these cases are not available in detail. From such information as can be had at this time it appears that in only a small proportion of the cases have damages been recovered. In a number of these cases, however, demurrers to the declarations have been overruled and the records show that the cases were subsequently dismissed. From this it appears probable that some of them were dismissed as a result of compromise between the parties.

OTHER SUITS BETWEEN PRIVATE PARTIES.—Seventy-four suits between private parties tried in the United States courts have required some interpretation or application of the law. These cases have included actions on contracts which the defendants contended were in violation of the act, or in which it was urged that the plaintiff was an unlawful combination in restraint of trade, and the court should therefore not enforce the contract; suits in equity to restrain violations of license agreements under the patent act and for damages for

[1] The data for cases between private parties is taken from the United States and Federal Reports. It is probable, therefore, that the figures do not include all the cases, as the reports do not contain opinions in all cases that arise.

violations of such agreements; actions for damages on covenants not to compete with the purchaser of a business, or suits praying an injunction to prevent violations of such agreements; suits by manufacturers to enforce contracts for maintenance of resale prices fixed by them.

In 51 cases the law has been urged in defense and in only 16 of these has it been successfully pleaded; in 10 instances it has been made the basis of plaintiff's claim for injunctive relief or damages and in only 3 of these has judgment been entered for the plaintiff. In 4 other cases the law has been invoked, but the decisions have rested on other grounds that have involved some question of jurisdiction or sufficiency of service of process, and no question of substantive rights under the law has been involved. In 9 cases private parties have sought by suits in equity to restrain violations of the law which they deemed resulted in injury to themselves; in these suits the courts have invariably held that such action will lie only at the suit of the Government.

OTHER ANTITRUST LAWS.

Section 26. General statement.

Besides the Sherman Antitrust Act of 1890 there should be especially noted certain provisions of the Act to Regulate Commerce of 1887, of the Wilson Tariff Act of 1894 (as amended by an act of Feb 12, 1913), of the Panama Canal Act of 1912, and of two recent laws, namely, the Federal Trade Commission Act of 1914 and the Clayton Antitrust Act of 1914. Each of these laws deals either largely or in part with other matters than trusts or combinations in restraint of trade. There has been practically no judicial interpretation of the meaning of those provisions of these laws which are considered here, except with respect to the Act to Regulate Commerce. The Federal Trade Commission Act and the Clayton Antitrust Act were enacted so recently that there has been little or no opportunity for such interpretation. Besides these laws there have been enacted certain others which have more or less bearing on the enforcement of the antitrust acts, but these do not require detailed consideration here.[1]

[1] Among these laws the following, which are of a substantive character, may be noted:

(1) An act making appropriations for sundry civil expenses, etc., of June 23, 1913. This law appropriated additional funds for the Department of Justice for the enforcement of the antitrust laws, but provided that none of these moneys should be expended in prosecuting (*a*) any organization or individual for entering into any combination to increase wages, etc., or any act done in furtherance thereof, not in itself lawful, or (*b*) producers of farm products and associations of farmers cooperating to obtain a fair and reasonable price for their products. The same provision was made in the sundry civil appropriation act of Aug. 1, 1914.

(2) An act making appropriations for the naval service, etc., of Mar. 4, 1913. This law provided that no part of the money appropriated should be expended for the purchase of certain steel products, armament, and machinery from persons, etc., who have conspired to monopolize interstate or foreign commerce in such articles, existing contracts excepted.

(3) An act making appropriations to provide for the expenses of the government of the District of Columbia, etc., of Mar. 4, 1913. This law created a Public Utilities Commission for the District of Columbia, and public-utility corporations were forbidden, without the consent of the commission, to transfer their franchises, to acquire the stocks or bonds of competing corporations, or to purchase the property of another public utility for the purpose of consolidation, etc.

Section 27. Act to Regulate Commerce of 1887.

The Act to Regulate Commerce of February 4, 1887, was apparently the first Federal statute containing any provision aimed to prevent monopolistic combinations, although the provision relating to such combinations is merely incidental to the broader purposes of the law.

Section 5 of this law prohibits any common carrier subject to this act from making any agreement with another common carrier for the pooling of freights of different and competing railroads or from dividing the earnings of such railroads.

SEC. 5. That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense. * * *

The only important case apparently which has been decided by the Supreme Court with reference to the construction of this section was Southern Pacific Co. *v.* Interstate Commerce Commission.[1] Certain western railroads had published through rates on citrus fruits from California to the Atlantic seaboard, allowing the shippers to control the routing. Later, on account of rebating to shippers practiced by connecting eastern roads, they issued new rates and reserved to themselves the routing, at the same time promising fair treatment to the eastern roads and eventually giving them certain percentages of guaranteed tonnage. The Interstate Commerce Commission, which regarded this action as subjecting shippers to undue disadvantage and a violation of section 3 of the Act to Regulate Commerce of 1887, ordered them to desist. The circuit court upheld the order, but on the ground that this arrangement was a violation of the prohibition against pooling in section 5. The Supreme Court reversed this decision, however, holding that the acts complained of were lawful and did not amount to a pooling of freights within the meaning of section 5. The court said in part (p. 560):

Now, while the most important, if not the only, effect of the routing agreement is to take away this rebating practice, and to hold all parties to that agreement as part of the joint through rate tariff, we think no case is made out of a violation of the pooling provision in the fifth section of the act, even where the initial carrier promises fair treatment to the connecting roads, and carries out such promises.

Rate agreements among railroads have also been attacked, however, under the Sherman Antitrust Law (see p. 95), and also combinations in the form of holding companies. (See p. 103.)

[1] 220 U. S., 536 (1906).

Section 28. Wilson Tariff Act of 1894.

This law was entitled "An act to reduce taxation, to provide revenue for the Government, and for other purposes," and became a law on August 27, 1894. In connection with the legislation regarding customs duties, certain provisions were inserted with a view to preventing combinations in restraint of trade with respect to the foreign commerce of the United States. These provisions are contained in sections 73 to 77, inclusive, of the said law. Sections 73 and 76 were slightly amended on February 12, 1913, the amended form being shown below.

Section 73 of the Wilson Tariff Act declares contrary to public policy, illegal, and void every combination, etc., of persons or corporations when any of them is engaged in importing articles into the United States, and when such combination is intended to operate in restraint of lawful trade or free competition in lawful trade, or to increase the market price in the United States of any article imported or of any manufacture into which such imported article enters; violation of the act is declared a misdemeanor and penalties are provided.

SEC. 73. That every combination, conspiracy, trust, agreement, or contract is hereby declared to be contrary to public policy, illegal, and void, when the same is made by or between two or more persons or corporations either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who is or shall hereafter be engaged in the importation of goods or any commodity from any foreign country in violation of this section of this Act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and, on conviction thereof in any court of the United States, such person shall be fined in a sum not less than one hundred dollars and not exceeding five thousand dollars, and shall be further punished by imprisonment in the discretion of the court, for a term not less than three months nor exceeding twelve months.[1]

Section 74 of this act, which provides for suits in equity by the United States Government, is practically identical in phraseology with section 4 of the Sherman Antitrust Act, except that it is made applicable to offenses described in section 73 of this act. The precise terms of this section, therefore, do not require repetition here. (See p. 71.)

Section 75 of this act, which relates to the jurisdiction of the courts in such equity suits, is practically identical in phraseology with section 5 of the Sherman Antitrust Act, except in the section

[1] The act of 1913, referred to above, amended this section by inserting the words "as agent or principal" near the beginning of the section.

numbers referred to, and, therefore, need not be repeated here. (See p. 71.)

Section 76 of this act, which relates to the seizure and condemnation of property owned by a combination, etc., is practically the same as section 6 of the Sherman Antitrust Act, except that it applies to articles "imported into and being within the United States or being in the course of transportation from one State to another, or to or from a Territory, or the District of Columbia," instead of to articles "in the course of transportation from one State to another, or to a foreign country."[1] (See p. 71.) It is therefore unnecessary to give the precise terms in further detail.

Section 77 of this act is identical with section 7 of the Sherman Antitrust Act, except that it is introduced with the additional word "that," and, therefore, need not be repeated here. (See p. 72.)

The most striking variation of the Wilson Tariff Act from the Sherman Antitrust Act is in the definition of the offense in section 73, which has been given above. In particular it should be noted that a combination "to increase the market price" either of an imported article or of an article manufactured from such imported article, is prohibited. This provision is made in addition to provisions prohibiting combinations "in restraint of lawful trade" or "free competition in lawful trade or commerce." No reference is made in this act to monopolizing or attempting to monopolize.

Section 29. Panama Canal Act of 1912.

An act of August 24, 1912, to provide for the opening of the Panama Canal, etc., provided in section 11, that section 5 of the Act to Regulate Commerce of February 4, 1887, should be amended substantially as follows: After July 1, 1914, it is declared unlawful for any common carrier subject to the provisions of the act to own, or control, directly or indirectly, or to have any interest in any common carrier by water, or vessel carrying freight or passengers, operated through the Panama Canal, or elsewhere, with which the said carrier does or may compete. Jurisdiction is conferred on the Interstate Commerce Commission to determine questions of fact in this connection and to make orders in respect thereto which are final. If the commission is of opinion that such service by water, other than through the Panama Canal, is being operated in the interest of the public, etc., and will not reduce competition, it may extend the period for which such service may be operated beyond July 1, 1914, subject to regulation by the commission in the same manner as the railroad which controls it is regulated. This amendment provides further that no vessel may engage in the coastwise or

[1] The act of 1913, referred to above, amended this section by inserting the words "imported into and being within the United States, or being" near the middle of the section.

foreign trade of the United States or pass through the Panama Canal if it is owned or controlled by any person or company doing business in violation of the Sherman Antitrust Act, or sections 73 to 77, inclusive, of the Wilson Tariff Act of 1894, or any acts amending or supplementing either of them. Jurisdiction in respect to this last provision is conferred on the Federal courts. The text of the foregoing provisions is as follows:

From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any railroad company or other common carrier subject to the Act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.

Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The Commission may on its own motion or the application of any shipper institute proceedings to inquire into the operation of any vesel in use by any railroad or other carrier which has not applied to the Commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said Commission shall be final.

If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July first, nineteen hundred and fourteen. In every case of such extension the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the Act to regulate commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation: *Provided*, Any application for extension under the terms of this provision filed with the Interstate Commerce Commission prior to July first, nineteen hundred and fourteen, but for any reason not heard and disposed of before said date, may be considered and granted thereafter.

No vessel permitted to engage in the coastwise or foreign trade of the United States shall be permitted to enter or pass through said canal if such ship is owned, chartered, operated, or controlled by any person or company which is doing business in violation of the provisions of the Act of Congress approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," or the provisions of sections seventy-three to seventy-seven, both inclusive, of an Act approved August twenty-seventh, eighteen hundred and

ninety-four, entitled "An Act to reduce taxation to provide revenue for the Government, and for other purposes," or the provisions of any other Act of Congress amending or supplementing the said Act of July second, eighteeen hundred and ninety, commonly known as the Sherman Antitrust Act, and amendments thereto, or said sections of the Act of August twenty-seventh, eighteen hundred and ninety-four. The question of fact may be determined by the judgment of any court of the United States of competent jurisdiction in any cause pending before it to which the owners or operators of such ship are parties. Suit may be brought by any shipper or by the Attorney General of the United States.

Section 30. Federal Trade Commission Act.

The Federal Trade Commission Act of September 26, 1914, established a commission with administrative and quasi-judicial functions. In certain aspects both of these functions have relation to the enforcement of the antitrust laws, and only in respect to these functions is it necessary to consider the Federal Trade Commission Act in this connection.

Section 6 of this act confers on the commission the following powers, among others: (1) To investigate the organization, business, management, etc., of corporations engaged in commerce, excepting banks and common carriers; (2) to require such corporations to make annual and special reports; (3) to investigate and report to the Attorney General on the manner in which a decree to prevent or restrain violations of the antitrust acts has been carried out; (4) to investigate and report on alleged violations of the antitrust acts upon the request of the President or either House of Congress; (5) to investigate and make recommendations concerning the readjustment of the business of any corporation alleged to be violating the antitrust acts, upon the application of the Attorney General; (6) to investigate trade conditions in foreign countries where combinations or other conditions may affect the foreign trade of the United States, and to report and make recommendations to Congress. This section reads as follows:

SEC. 6. That the commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the com-

mission may prescribe, unless additional time be granted in any case by the commission.

(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.

(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices, of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

In another section the terms "commerce" and "corporations" are defined for the purposes of this act. "Commerce" means commerce among the States or with foreign nations; "corporations" include all associations to carry on business for profit, but not partnerships.

In this connection it should be noted that this act abolishes the Bureau of Corporations (see p. 13) and transfers its work to the Federal Trade Commission together with the personnel, records, etc. The Commissioner of Corporations, whose office is abolished by the act, had similar though less extensive powers.

Section 7 of this act provides that where equity suits are brought under the antitrust acts and the court is of opinion that the complainant is entitled to relief, it may refer the suit to the commission to act as a master in chancery to report an appropriate form of decree; the court, however, may adopt or reject the commission's report.

SEC. 7. That in any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon

such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such a decree as the nature of the case may in its judgment require.

While the foregoing powers of the commission expressly relate in large part to the enforcement of the antitrust laws, another important power is conferred on the commission which is also related thereto. By section 5 of this act unfair methods of competition in commerce are declared unlawful, and the commission is empowered to prevent such practices by persons, partnerships, or corporations, except banks and common carriers. For this purpose the commission is authorized after due hearing to issue orders requiring the cessation of such unfair methods of competition. To secure the observance of such an order, the commission may apply to the Federal courts, submitting the entire record in the case, and the court may affirm, modify, or set aside such order. In case it is sought to introduce new evidence before the court, the court may allow it and may order that it shall be taken before the commission. Any party required by order of the commission to cease from using unfair methods of competition may obtain a court review in a similar manner. The language of this section is as follows:

SEC. 5. That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the antitrust Acts.

Complaints, orders, and other processes of the commission under this section may be served by anyone duly authorized by the commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person, partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order,

or other process registered and mailed as aforesaid shall be proof of the service of the same.

While unfair methods of competition are not necessarily practices forbidden by the antitrust acts, yet Congress, as indicated by the reports of the committees having jurisdiction in this legislation, intended, in part, by this provision to prevent the development of monopolistic conditions.[1]

The last section of this act expressly provides that nothing contained in it shall be construed to alter, modify, or repeal the antitrust acts, or to interfere with the enforcement thereof.

SEC. 11. Nothing contained in this Act shall be construed to prevent or interfere with the enforcement of the provisions of the antitrust Acts or the Acts to regulate commerce, nor shall anything contained in the Act be construed to alter, modify, or repeal the said antitrust Acts or the Acts to regulate commerce or any part or parts thereof.

Section 31. Clayton Antitrust Act.

The Clayton Antitrust Act, which is entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," was approved on October 15, 1914. As its title indicates, it relates in part to the same subject as the antitrust acts described above. Only these portions of the law are considered below. Other portions which are not discussed relate especially to the use of injunctions by the courts, to punishment for contempts with respect to such injunctions, and to making criminal certain dishonest practices in the management of common-carrier corporations.

The chief provisions of the Clayton Act which are of importance in connection with the antitrust laws relate to (1) the prohibition of certain trade practices (secs. 2 and 3); (2) the prohibition of certain forms of company organization and management (secs 7 and 8); (3) a requirement that common carriers in certain cases shall purchase supplies, etc., through competitive bids and prohibiting interference with free competition in bidding (sec. 10); (4) a specific rule of construction in the application of the antitrust laws to certain kinds of associations (sec. 6); (5) various provisions as to the remedies, rules of evidence and procedure in the enforcement of the antitrust laws (secs. 4, 5, 11, 14, 15, 16, and 20).

Section 1 defines certain terms used in this act substantially as follows: "Antitrust laws" includes the Sherman Antitrust Act of 1890, sections 73 to 77, inclusive, of the Wilson Tariff Act of 1894, as amended, and also this act; "commerce" includes interstate and foreign commerce, but does not apply to the Philippine Islands; "person" includes a corporation or association.

Section 2 declares it unlawful for any person engaged in commerce to discriminate in price between different purchasers of commodities

[1] See House Report No. 1142, 63d Cong., 2d. sess.

sold for use, consumption, or resale within the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce, with the proviso that this shall not prevent discrimination in prices made on account of differences in quality or quantity of the commodity sold, on account of differences in the cost of selling or transportation, or in order to meet competition, in good faith, and with the further proviso that this shall not prevent persons from selecting their own customers in bona fide transactions not in restraint of trade. This section reads as follows:

SEC. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

The principal qualification of this prohibition, apparently, and the one which indicates its relation to the antitrust laws, is that such price discrimination is unlawful where the effect "may be to substantially lessen competition or tend to create a monopoly." It may also be noted that the prohibition does not extend, apparently, to sales in export trade. Each of the provisos, moreover, adds further important limitations to the scope of this prohibition.

Section 3 declares it unlawful for any person engaged in commerce to lease or make a sale or contract of sale of commodities, patented or unpatented, for use, consumption, or resale within the jurisdiction of the United States, or to fix a price therefor or a discount from such price, on the condition that the lessee or purchaser shall not use or deal in the commodities of a competitor, where the effect of such lease, sale, or contract of sale or of such condition may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

SEC. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other

commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

The only qualification of this prohibition, apparently, is the same as the principal qualification of the preceding one, namely, where the effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." This proviso connects this prohibition with the prohibitions of previous antitrust laws.

Section 7 declares that no corporation engaged in commerce shall acquire stock in another corporation where the effect may be to substantially lessen competition between them, or to restrain commerce in any community, or tend to create a monopoly of any line of commerce, and that no corporation shall acquire the stock of two or more corporations engaged in commerce where the effect of such acquisition or the voting of such stock may be to lessen competition between the corporations whose stock is so acquired, or to restrain commerce in any community, or tend to create a monopoly of any line of commerce. It is also provided, however, that these prohibitions shall not apply to the mere investment by one corporation in the stock of another, or to the formation of subsidiary corporations for carrying on the immediate lawful business of a corporation or the natural extensions thereof where the effect is not to substantially lessen competition, or to the acquisition by a common carrier, subject to the laws to regulate commerce, of the stock of a branch line, or an extension where there is no substantial competition between them. Finally, it is provided that these prohibitions shall not have a retroactive effect or make lawful anything which was unlawful under the antitrust laws.

SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from

owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

This section is aimed at combinations in restraint of trade through the device of stock ownership, in the form of the holding company or otherwise. Neither the holding company nor the investment by one corporation in the stock of another is declared unlawful unless it substantially lessens competition or tends to create a monopoly. These qualifications form the connecting link between the prohibitions of this section and those of previous antitrust laws.

Section 8 prohibits all corporations engaged in commerce, any one of which has capital, surplus, and undivided profits exceeding $1,000,000, except banks and common carriers subject to the Act to Regulate Commerce of February 4, 1887, from having common directors after two years from the enactment of the law, if such corporations are or have been competitors so that the elimination of competition between them would be a violation of the antitrust laws. Prohibitions of a more particular character are also made with respect to banks, etc.

SEC. 8. That from and after two years from the date of the approval of this Act no person shall at the same time be a director or other officer or employee of more than one bank, banking association or trust company, organized or operating under the laws of the United States, either of which has deposits, capital, surplus, and undivided profits aggregating more than $5,000,000; and no private banker or person who is a director in any bank or trust company, organized and operating under the laws of a State, having deposits, capital, surplus, and undivided profits aggregating more than $5,000,000, shall be eligible to be a director in any bank or banking association organized or operating under the laws of the United States. The eligibility of a director, officer, or employee under the foregoing provisions shall be determined by the average amount of deposits, capital, surplus, and undivided profits as shown in the official statements of such bank, banking association, or trust company filed as provided by law during the fiscal year next preceding the date set for the annual election of directors, and when a director, officer, or employee has been elected or

selected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter under said election or employment.

No bank, banking association or trust company, organized or operating under the laws of the United States, in any city or incorporated town or village of more than two hundred thousand inhabitants, as shown by the last preceding decennial census of the United States, shall have as a director or other officer or employee any private banker or any director or other officer or employee of any other bank, banking association or trust company located in the same place: *Provided*, That nothing in this section shall apply to mutual savings banks not having a capital stock represented by shares: *Provided further*, That a director or other officer or employee of such bank, banking association, or trust company may be a director or other officer or employee of not more than one other bank or trust company organized under the laws of the United States or any State where the entire capital stock of one is owned by stockholders in the other: *And provided further*, That nothing contained in this section shall forbid a director of class A of a Federal reserve bank, as defined in the Federal Reserve Act, from being an officer or director or both an officer and director in one member bank.

That from and after two years from the date of the approval of this Act no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

When any person elected or chosen as a director or officer or selected as an employee of any bank or other corporation subject to the provisions of this Act is eligible at the time of his election or selection to act for such bank or other corporation in such capacity his eligibility to act in such capacity shall not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in the affairs of such bank or other corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment.

Considering only the prohibitions respecting corporations other than banks, it may be noted that a provision is made as to the effect in lessening competition similar in general intent to the provisions made in connection with the prohibitions in sections 2, 3, and 7. It should also be noted that common carrier corporations subject to the Interstate Commerce Act are not affected at all by this section. The reason is found apparently in the fact, noted in the debates in Congress, that it was planned to enact an additional law regarding the issuance of securities by common carriers, and it was contended that any prohibitions regarding common directors or officers could be more advantageously incorporated therein. A

bill for this general purpose was passed by the House but was not enacted into law by the Sixty-third Congress.[1]

Section 10 provides in substance that common carriers, after two years from the approval of this law, shall not have certain dealings with regard to securities or supplies, with another firm or company where they have common directors, officers, or agents, or where a person having such relation to a common carrier is financially interested in such other firm or company, unless such dealings are conducted on the basis of giving the business to the lowest bidder. Any person who directly or indirectly prevents or attempts to prevent anyone from bidding or free and fair competition among the bidders is made punishable. Provision is made for reports on such dealings to the Interstate Commerce Commission, and penalties are provided for common carriers or their directors, officers, or agents who aid or abet in violating the prohibitions of this section.

SEC. 10. That after two years from the approval of this Act no common carrier engaged in commerce shall have any dealings in securities, supplies or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership or association when the said common carrier shall have upon its board of directors or as its president, manager or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding or shall do any act to prevent free and fair competition among the bidders or those desiring to bid shall be punished as prescribed in this section in the case of an officer or director.

Every such common carrier having any such transactions or making any such purchases shall within thirty days after making the same file with the Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bidding, who were the bidders, and the names and addresses of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

If any common carrier shall violate this section it shall be fined not exceeding $25,000; and every such director, agent, manager or officer thereof who shall have knowingly voted for or directed the act constituting such violation or who shall have aided or abetted in such violation shall be deemed guilty of a misdemeanor and shall be fined not exceeding $5,000, or confined in jail not exceeding one year, or both, in the discretion of the court.

[1] H. R. 16586.

Section 6 declares that labor is not a commodity or an article of commerce; that nothing contained in the antitrust laws shall be construed to forbid the existence of labor, agricultural, or horticultural organizations, not having capital stock or conducted for profit, or to forbid the members from lawfully carrying out the legitimate objects thereof, and that such organizations or their members shall not be construed to be illegal combinations.

SEC. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

While the five of the preceding sections considered (2, 3, 7, 8 and 10) may be considered as having increased the legal limitations placed on individual or associational activities, this section decreases the legal limitations with respect to labor unions, agricultural associations, and the members thereof. In this connection reference should also be made to section 20 (see p. 141), which makes lawful certain practices which are sometimes employed by labor unions.

Section 4 provides that any person injured in his property by an act forbidden by the antitrust laws may sue in the United States courts and recover threefold damages.

This provision is the same as section 7 of the Sherman Antitrust Act (see p. 72), except that the word "that" is placed at the beginning, and is identical, therefore, with section 77 of the Wilson Tariff Act (see p. 126), and need not be repeated here. By this section, however, this particular form of remedy is extended to apply to acts forbidden in this law also.

Section 5 provides that a final decree in a proceeding in equity brought by the United States under the antitrust laws shall be prima facie evidence against the defendant in any suit brought by any other party under those laws, with respect to all matters in which the decree would be an estoppel between the parties. It is provided, however, that this shall not apply to consent decrees which are entered without taking testimony or to such decrees in certain other cases.

Another paragraph of this section provides in substance that when the United States institutes a proceeding under the antitrust laws the statutory limitations with respect to the period in which a private suit may be brought which is based in whole or in part on the matter complained of shall be suspended during the pendency of such proceeding.

SEC. 5. That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken: *Provided further*, This section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity, now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken.

Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof.

The provisions of this section increase the protection afforded by the antitrust laws by a new rule of evidence and by extending in certain cases the period of prescription for private suits.

Section 11 gives to the Interstate Commission Commission, the Federal Reserve Board, and the Federal Trade Commission, respectively, the authority to enforce the provisions of sections 2, 3, 7, and 8 in so far as they affect persons or corporations subject to their jurisdiction. The form of procedure is substantially the same in each case as that prescribed for the Federal Trade Commission with respect to unfair methods of competition, which has been quoted above. (See p. 130.) The text of this provision is given, therefore, only for the introductory paragraph which defines the jurisdiction of the several administrative boards or commissions.

SEC. 11. That authority to enforce compliance with sections two, three, seven, and eight of this Act by the persons respectively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows: * * *

This paragraph is found in place of the first and second paragraphs of section 5 of the Federal Trade Commission Act. Otherwise section 5 and this section are identical, except that a clause in the first sentence of the third paragraph in section 5, namely, "and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public," is not found in section 11 of this law.

In this connection it may be noted that sections 2, 3, 7, and 8, while they forbid certain practices or forms of business organization, do not prescribe any penalties. Section 11 furnishes one means of enforcing these prohibitions, namely, in the last resort a court injunc-

tion; others are found in section 15 (see below), which gives the district attorneys a right to bring suits in equity to restrain violations of the law; in section 4, which gives persons injured thereby the right to sue for triple damages; and in section 16 (see below), which gives persons, associations, etc., the right to injunctive relief in certain cases.

Section 14 provides that when a corporation has violated penal provisions of the antitrust laws the directors, officers, or agents who authorized, ordered, or committed any of the acts constituting in whole or in part such violation shall be held guilty of a misdemeanor and upon conviction punished by fine or imprisonment, or both.

SEC. 14. That whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

This provision applies apparently to sections 1, 2, and 3 of the Sherman Antitrust Act, to section 73 of the Wilson Tariff Act, and to sections 9 and 10 of this law, which prohibit certain practices by common carriers engaged in commerce. Sections 2, 3, 7, and 8 of this act contain prohibitions, but no penal provisions.

Section 15 gives to the several district attorneys of the United States the duty to institute proceedings to prevent violations of this act and the duty, under the direction of the Attorney General, to bring suits in equity for that purpose, and prescribes the form of procedure. This section is identical with sections 4 and 5 of the Sherman Antitrust Act (see p. 71), except that the word "that" is placed at the beginning of the section. It is not necessary, therefore, to repeat the language of this section. It should be noted, however, that this section gives the district courts a jurisdiction concurrent with that of the Federal Trade Commission, the Federal Reserve Board, and the Interstate Commerce Commission, respectively, in the enforcement of sections 2, 3, 7, and 8 of this law.

Section 16 gives to any person, firm, corporation, or association the right to relief by injunction for threatened loss or damage by a violation of the antitrust laws, including sections 2, 3, 7, and 8 of this act under the same conditions as such relief would be granted by a court of equity, except with respect to matters subject to the jurisdiction of the Interstate Commerce Commission regarding common carriers.

SEC. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the

same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

Section 20 provides that in any case between an employer and employees, etc., relating to or growing out of a dispute as to the terms of employment, the United States courts shall not issue injunctions unless necessary to prevent irreparable injury to the property rights of the applicant.

This section provides further that an injunction shall not prohibit any person or persons, whether singly or in concert, from ceasing to work or persuading others to do so by peaceful means, or from attending at any place where he may lawfully be in order peacefully to communicate information or to persuade any person to abstain from working, or from ceasing to patronize or employ any party to such dispute, or persuading others thereto by peaceful and lawful means, or from paying or withholding strike benefits, or from peaceably assembling in a lawful manner and for lawful purposes. Finally, it is declared that the acts specified in this paragraph shall not be held to be violations of any law of the United States.

SEC. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

This section aims primarily to limit the use of injunctions in labor disputes, especially with respect to such practices as "picketing" and "boycotting." It should be noted, however, that the last clause of the section is practically declaratory law and appears to make lawful certain practices of labor combinations which have sometimes been held to be unlawful by the courts.

This law contains also several other sections relating to the use of injunctions and to punishment for contempts, but they have no peculiar relation to the enforcement of the antitrust laws, and therefore do not need to be considered here.

CHAPTER IV.

IMPORTANT PROVISIONS OF STATE ANTITRUST LAWS.

Section 1. Introductory.

Since Federal antitrust laws do not reach purely intrastate transactions, there has been left to the States themselves an important field of activity in regulating trade and business practices. In recent years, especially in the past decade, various States have passed a large number of laws relating to trusts, monopolies, and restraint of trade. It seems desirable, therefore, in order that the entire field of antitrust legislation may be covered, to present a digest of State constitutional and statutory provisions relating to this subject. The object of these statutes, speaking broadly, has been twofold—first, to make criminal many contracts and agreements which at the common law were probably void only; second, to specify many practices which may in some cases have been held to be contrary to the principles of the common law, or to be included in the general terms "monopoly" or "restraint of trade," thus meeting, as far as practicable, the demand for more definiteness in the laws relating to this subject. In addition, a number of States have prohibited certain practices, such as local price cutting and demands by manufacturers for exclusive dealing, which the legislative bodies apparently considered would, if permitted, inevitably result in restraint of trade or tend to monopoly.

The plan of this chapter is to group by subjects the more important provisions of these laws to show the extent to which they have been adopted throughout the States and the differences in the terms employed in statutes apparently designed to apply to the same conditions or practices. The broad subjects covered in this presentation are: (1) Monopoly, (2) restraint of trade, (3) restraint of competition, (4) pooling, (5) price control, (6) limitation of output, (7) division of territory, (8) restraints on resales, (9) competitive methods, (10) provisions affecting agricultural interests, (11) provisions affecting labor, (12) holding companies, (13) provisions affecting business of a public nature, (14) recognition of common law principles, (15) administration of the law, (16) evidence, burden of proof, indictments, etc., (17) penalties, (18) stock watering. Wherever possible, a law which is fairly typical has been chosen as a model or basis of comparison for a particular group or subject, followed by a state-

ment of the differences, if any, between this and similar laws of other States. This is followed by further laws touching the same subject matter but so dissimilar that they do not admit of being compared in detail. This method of treatment has frequently necessitated separating closely related portions of a statute dealing with a number of specific offenses, and presenting them under separate titles.

An attempt has been made to give the substance of the statutes, but where the use of particular terms appeared to be important the exact wording has been preserved.

In addition to the statutory provisions, the more important decisions construing them, or showing conditions or practices which the courts have declared to be in violation thereof, have been digested and inserted.

With very few exceptions, the chapter includes only provisions clearly directed at the prevention of monopoly and restraint of trade. A section on stock watering, properly a part of the corporation laws, has been inserted because of the fact that this subject is very generally discussed in connection with antitrust legislation.[1]

Section 2. Monopoly.

CONSTITUTIONAL PROHIBITIONS.—Monopolies are prohibited but not defined in the constitutions of many States. They are prohibited in the constitutions of five of the States[2] (Oklahoma, Arkansas, Tennessee, Texas, and Wyoming) in substantially the following language: Perpetuities and monopolies are contrary to the genius of a free government and shall never be allowed. In North Carolina it is declared that they "ought not to be allowed" (Const., Art. I, sec. 31).

The constitutions of three States[3] (Arizona, South Dakota, and Washington) declare that monopolies "shall never be allowed."

The Maryland constitution (art. 41) declares that they are "odious, contrary to the spirit of a free government and the principles of commerce and ought not to be suffered."

A section of the constitution of Connecticut (art. 1, sec. 1) declares that "no man or set of men are entitled to exclusive public emoluments or privileges from the community."

The New Mexico constitution (art. 4, sec. 38) directs the legislature to "enact laws to prevent * * * monopolies * * *"; and the constitution of Virginia (sec. 165) commands the legislature to prevent "monopolies inimical to the public welfare."

[1] The publication of the House Committee on the Judiciary entitled "Laws on Trusts and Monopolies" (Dec. 1, 1913), which contains reprints of most of the State antitrust laws, has been largely used in the preparation of this chapter, supplemented by extensive reference to the original statutes and reported cases.

[2] Oklahoma, Art. II, sec. 32; Arkansas, Art. II, sec. 19; Tennessee, Art. I, sec. 22; Texas, Art. I, sec. 26; and Wyoming, Art. I, sec. 30.

[3] Arizona, Constitution, Art. XIV, sec. 15; South Dakota, Art. XVII, sec. 20, and Washington, Art. XII, sec. 22.

Section 103 of the constitution of Alabama is as follows:

The legislature shall provide by law for the regulation, prohibition, or reasonable restraint of common carriers, partnerships, associations, trusts, monopolies, and combinations of capital, so as to prevent them or any of them from making scarce articles of necessity, trade, or commerce, or from increasing unreasonably the cost thereof to the consumer, or preventing reasonable competition in any calling, trade, or business.[1]

In the constitution of Minnesota (Art. IV, sec. 35), combinations to monopolize the markets for food products in the State, or to interfere with or restrict the freedom of such markets, are declared criminal conspiracies.

The constitution of Louisiana (art. 190, adopted Nov. 22, 1913) prohibits all monopolies or combinations to monopolize trade or commerce.

The constitution of Georgia (Art. IV, sec. 2) declares that the general assembly shall have no power to authorize any corporation to buy stock in any other corporation or to make any contract or agreement with any corporation, which may have the effect, or be intended to have the effect, to defeat or lessen competition or to encourage monopoly.

The constitution of New Hampshire (art. 82) declares that "free and fair competition in the trades and industries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it," and grants to the general court the power to enact laws "to prevent the operations within the State of all persons and associations, and all trusts and corporations, foreign or domestic, and the officers thereof, who endeavor to raise the price of any article of commerce or to destroy free and fair competition in the trades and industries through combination, conspiracy, monopoly, or any other unfair means."

STATUTORY DEFINITIONS.—The statutes of four of the States define monopoly. The laws of Arkansas and of South Carolina define it as follows:

A monopoly is any union or combination or consolidation or affiliation of capital, credit, property, assets, trade, customs, skill or acts of/or any other valuable thing or

[1] *Citizens Light, Heat & Power Co.* v. *Montgomery Light & Water Power Co.* (*171 Fed., 553 (1909)*).—Complainant prayed, among other things, that defendant be enjoined and restrained from any effort to induce any of the customers of complainant to violate any subsisting contract to furnish electricity either for a definite or indefinite term, or from agreeing to indemnify and hold harmless customers of the complainant from liability for damages for breaches of contract; and further asked general relief from such acts as taking business at less than cost to induce customers not to contract with complainant and thus securing a monopoly of business for itself. Held, that the Alabama Constitution of 1901, section 103, had not narrowed competition as defined at the common law; that under this section one man could take over all of another's customers, and thus control a business if it resulted from competition within legal limits; that the court could not restrain the defendant from inducing a breach of complainant's contracts by mere solicitation, for that would be offensive to the policy of the law which was to foster competition, and would be building up rather than destroying monopoly; but that the court could enjoin the defendant from agreeing to indemnify the complainant's customers for breaking their contracts.

possession, by or between persons, firms or corporations, or association of persons, firms or corporations, whereby any one of the purposes or objects mentioned in this act [1] is accomplished or sought to be accomplished, or whereby any one or more of said purposes are promoted or attempted to be executed or carried out, or whereby the several results described herein are reasonably calculated to be produced; and a monopoly, as thus defined and contemplated, includes not merely such combination by and between two or more persons, firms and corporations, acting for themselves, but is especially defined and intended to include all aggregations, amalgamations, affiliations, consolidations or incorporations of capital, skill, credit, assets, property, custom, trade or other valuable thing on/or possession whether effected by the ordinary methods of partnership or by actual union under the legal form of a corporation, or any incorporated body resulting from the union of one or more distinct firms or corporations, or by the purchase, acquisition or control of shares or certificates of stocks or bonds, or other corporate property or franchises, and all partnerships and corporations that have been or may be, created by the consolidation or amalgamation of the separate capital, stock, bonds, assets, credit, property, customs, trade, corporate or firm belongings of two or more firms or corporations or companies, are especially declared to constitute monopolies within the meaning of this act, if so created or entered into for any one or more of the purposes named in this act.[2] * * *

The statutes of Texas define a monopoly as follows:

A monopoly is a combination or consolidation of two or more corporations when effected in either of the following methods:

1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust as defined in the first section of this act.[3]

2. Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties, or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise.[4]

South Dakota defines a monopoly as a combination of capital or skill, by two or more persons, firms, corporations, or associations of persons—

First. To create or carry out restrictions in trade.

Second. To limit the production or to increase or reduce the price of commodities.

Third. To prevent competition in the manufacture, transportation, sale or purchase of merchandise, produce or commodities.

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[1] Briefly, the Arkansas act prohibits agreements to regulate prices or insurance premiums, or to limit output, selling at less than cost of manufacture or giving away products for the purpose of financially injuring competitors, and the law of South Carolina in addition prohibits refusals to buy from or sell to another under certain conditions.

[2] Arkansas, Laws 1905, Act 1, as amended Mar. 12, 1913; South Carolina, Laws 1902, No. 574, sec. 2.

[3] Briefly, a trust is defined under the law to be a combination to (1) create or carry out restrictions of trade; (2) regulate prices of commodities or insurance; (3) prevent or lessen competition; (4) fix any standard to control the price of any commodity; (5) enter into any agreement (*a*) not to sell or transport, or to prepare for market any commodity, or make any contract of insurance at a price below a common standard, or (*b*) to keep the price of such commodity, service, transportation or insurance at a fixed or graded figure, or (*c*) to preclude free competition in the sale, etc., of such commodity, transportation, service or insurance, or (*d*) to pool any interest they may have in the sale or purchase of any such commodity, service, transportation or insurance whereby its price or the charge therefor is affected; (6) to regulate the output of any article, the amount of insurance to be undertaken, or the amount of work which may be done in the preparation of any product for market or transportation; (7) to abstain from doing business in the State or any part thereof.

[4] Texas, Laws 1903, Chap. XCIV, sec. 2.

Fourth. To fix any standard or figure whereby the price to the public shall be in any manner established or controlled.[1]

STATUTORY PROHIBITIONS.—The statutes of 21 States prohibit monopoly, and in one of these (Oklahoma) the prohibition extends to "virtual monopolies."

In New Mexico the legislature has declared that "perpetuities and monopolies are contrary to the genius of a free government and shall never be allowed."[2]

In New York, under certain conditions, corporations are authorized to purchase and hold stock of other corporations, but are prohibited from combining for the creation of a monopoly.[3] This State also prohibits all arrangements, combinations, etc., whereby a monopoly in the manufacture, production, or sale in the State of any article or commodity of common use may be created, or whereby, for the purpose of creating such monopoly, the free pursuit in the State of any lawful business, trade, or occupation is restricted or prevented.[4]

The laws of Montana prohibit any person, corporation, or association of persons in the State, directly or indirectly, from combining or making any contract in any manner whatever to create a monopoly in the manufacture, sale, or transportation of any article of commerce (including gas, water, water power, electric light, and electric power, for whatever purpose used or employed).[5]

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[1] South Dakota, Laws 1909, chap. 224, sec. 1.

State v. *Fullerton Lumber Co., et al., 152 N. W., 708 (S. Dak., 1915).*—The defendants who were engaged in selling lumber, coal, and building material, at Geddes, S. Dak., were charged with a conspiracy in restraint of trade in violation of the laws of 1909, chap. 224. It was alleged that the defendants agreed upon and adopted a maximum and minimum price list, the former, which afforded a large profit, to be followed where the parties had no outside competition, and the latter, which represented the actual cost of the commodities, to be followed in communities where there was such competition. Certain of the defendants were found guilty and, on appeal, the conviction was affirmed, the appellate court holding that the offense was complete upon entering into the agreement and that it was not necessary to prove an overt act under the agreement.

[2] New Mexico Stats., 1915, sec. 4770.

[3] New York, Cons. Laws, S. C. L., secs. 14, 52.

Burrows v. *Interborough Metropolitan Co., 156 Fed., 389 (1907).*—In statutes prohibiting contracts or combinations creating monopolies, the word "monopoly" is not used in a strict legal sense, as including the power to legally exclude all others from the field monopolized, but means the obtaining of a substantially complete control of a particular business or article. The acquisition by a corporation of a controlling interest in the stock of corporations owning or controlling and operating all street railway lines in Manhattan and the Bronx, including underground, elevated, and surface lines, is unlawful as creating a monopoly of the means of transportation of passengers in the city in violation of S. C. L., sec. 14.

Attorney General v. *Consolidated Gas Co., 124 N. Y. App. Div., 401 (1908).*—The consolidation of six New York gas companies under the name of the Consolidated Gas Co., and the subsequent acquisition by the latter of the whole or the majority of the capital stock of other gas and electric-lighting companies under S. C. L., sec. 52, did not offend S. C. L., sec. 14, because, even though designed to prevent competition, it did not constitute a monopoly under the statute, as no exclusive right was obtained. Nor could the price of gas or electricity be arbitrarily fixed by the corporation, both of these matters being within the control of the legislature, which may fix the maximum rate and compel the production and sale of gas to consumers. Such companies are distinguished from a corporation or combination dealing in ice, milk, coal, etc., organized to control output or fix prices.

Continental Securities Co. v. *Interborough Rapid Transit Co., 165 Fed., 945 (1908).*—Competing street railways in New York City combined through transfer of their stock to a holding company. The combination resulted in a monopoly held illegal under S. C. L. 14, which limits S. C. L. 52, and this although it is within the power of the legislature, by enactment or the operations of some commission created by it, to remedy the evils that might result from the monopoly if left undisturbed.

[4] New York, Cons. Laws, Gen. Business Law, sec. 340.

[5] Montana, Laws 1909, chap. 97, sec. 1.

New Jersey prohibits combinations or agreements to acquire a monopoly in intrastate or interstate business or commerce.[1] This State also prohibits the purchase by a corporation of the stock of any other corporation, or any property, for the purpose of acquiring a monopoly.[2] It is also a misdemeanor for any person or persons to organize any corporation in New Jersey to be used in acquiring a monopoly, or for any officer, director, manager, or employee of any corporation organized under the laws of New Jersey to use the corporation, or permit it to be used, in acquiring a monopoly, when such corporation engages in interstate or intrastate commerce.[3]

Kansas prohibits conspiracies and combinations "for the purpose of monopolizing any line of business."[4]

Utah prohibits any corporation, its officers, stockholders, agents, or employees, from entering into a combination or agreement the purpose of which is to monopolize any part of the trade or commerce within the State.[5]

Michigan provides that—

> Any corporation organized under the laws of this State for the purpose of establishing and maintaining, or attempting to establish or maintain, any combination of persons, copartnerships or corporations with intent to establish and maintain or of attempting to establish and maintain a monopoly of any trade, pursuit, avocation, profession, or business, is hereby declared to be against public policy and illegal and void.

Foreign corporations organized with the intent of establishing such a monopoly are prohibited from doing business in the State, and another section of the law prohibits all combinations for such purposes.[6]

Vermont prohibits the filing of articles of association or certificates of increase of capital stock of any corporation to an amount exceeding

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[1] New Jersey, Laws 1913, chap. 13, sec. 1.

[2] Idem, 1913, chap. 15, sec. 1.

[3] Idem, 1913, chap. 16, secs. 1, 2.

[4] Kansas, Laws 1899, chap. 293, sec. 2; G. S., sec. 5178.

[5] Utah, Stats., sec. 1754.

[6] Michigan, P. A. 1905, No. 329, secs. 2, 3, 4.

Attorney General v. *National Cash Register Co.*, *148 N. W., 420, 421* (*Mich., 1914*).—This was an information in the nature of quo warranto on the relation of the Attorney General, charging that the respondent was violating the antitrust laws of Michigan in establishing and maintaining a monopoly and conspiring to maintain a monopoly and to suppress all competition. It was also alleged that the respondent had used, among others, the following methods: "Interference with competing companies; interference with competing salesmen; interference with sales made by competing salesmen, and interfering with the contracts of competing companies; following and interfering with the business of competing salesmen; interfering with the mechanism of competing machines; watching and spying out the shipments of competing companies; watching the factories of competing manufacturers; circulating damaging statements relating to the standing and business of competing companies; maintaining a display window of competitive machines and advertising to sell them at 30 cents on the dollar; manufacturing and using knockout machines; employing secret agents, detectives, spies, and knockout men; the use of knockout credit cards; placing its employees in offices of competing companies without the latters' knowledge; blocking sales of competitors; instituting many suits and threatening to bring others against manufacturers and competing companies, and against their customers; bringing infringement suits without intention of prosecuting them; and, in many other ways too numerous to mention, endeavoring to establish a monopoly in the business." The court found the respondent guilty of a violation of sec. 4 of Act No. 329 of the Public Acts of 1905, and ordered, in case the respondent failed to pay a fine of $10,000 and costs, that it be ousted of all rights and forever prohibited from doing business in the State.

$10,000,000 until the same have been submitted to a judge of the supreme court, who shall not permit the organization or increase if in his opinion it is liable to create a monopoly (or result in restraining competition in trade).[1]

Idaho, Indiana, Louisiana, and Nebraska prohibit monopolies by adopting section 2 of the Sherman Law, but limiting its application to commerce within the State, and the substance of this section limiting it to intrastate commerce has been incorporated in the laws of Maine and Wisconsin.[2]

Porto Rico prohibits monopolizing or attempts to monopolize, and combinations or attempts to combine with any other person or persons to monopolize any part of the trade or commerce in any town of Porto Rico or between the towns thereof.[3]

Alabama and Mississippi prohibit monopolizing and attempts to monopolize the production, control, or sale of any commodity, or the prosecution, management, or control of any kind, class, or description of business.[4]

Hawaii prohibits conspiracies "to establish, create, manage, or conduct a trust or monopoly in the purchase or sale of any commodity."[5]

Arizona prohibits the creation or maintenance of a monopoly.[6]

Oklahoma prohibits monopolies and "virtual monopolies."[7]

Arkansas, South Carolina, South Dakota, and Texas prohibit monopolies as above defined.[8] (See pp. 145–147.)

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[1] Vermont, Pub. Stats., 1906, sec. 4311, as amended by Laws 1910, No. 143, sec. 4.

[2] Idaho, Laws 1911, chap. 215, sec. 2; Indiana, Laws 1907, chap. 243, sec. 2; Louisiana, Laws 1890, Act 86, sec. 3; Maine, Laws 1913, chap. 106, sec. 2; Nebraska, Laws 1905, chap. 162, sec. 2; Wisconsin, Stats. 1913, sec. 1747e.

[3] Revised Statutes and Codes of Porto Rico, 1911, sec. 2374.

[4] Alabama, Code 1907, sec. 7581; Mississippi, Code 1906, sec. 5002, as amended, Laws 1908, chap. 119, sec. 1.

[5] Hawaii, Revised Laws (1915), sec. 4085.

[6] Arizona, Laws 1912, chap. 73, sec. 7.

[7] Oklahoma, Laws 1908, p. 750, secs. 2, 5, 13; see also New Jersey, Laws 1913, chap. 14.

State v. *Coyle, 150 Pac., 316 (1915).*—The antitrust law of 1908 (Comp. Laws 1909, secs. 8800–8819) is not void for uncertainty, and the definitions of "trust," "monopolies," and "unlawful combinations in restraint of trade and against public policy" therein contained are sufficient to define the offenses as being a virtual monopoly in restraint of trade.

[8] Arkansas, Laws 1905, Act I, as amended by act Mar. 12, 1913; South Carolina, Laws 1902, No. 574, sec. 2; South Dakota, Laws 1909, chap. 224, sec. 6; Texas, Laws 1903, Chap. XCIV, secs. 2, 4.

Sullivan v. *Rime, 160 N. W., 556 (S. D., 1915).*—Action to recover the purchase price of certain patterns sold to defendant, as licensee and agent, under a contract by which defendant agreed not to offer for sale any other make of patterns. Defendant demurred on the ground that the contract was in violation of chapter 224, Laws of 1909, prohibiting monopolies and was therefore unenforceable. Held, whether the contract was one of agency or sale, it was not within the statute referred to, and this regardless of whether the patterns in question were patented or copyrighted. (Citing Wood Mowing Co. *v.* Greenwood Hardware Co., 75 S. C., 378.)

Houck & Dieter v. *Anheuser-Busch Brewing Association, 88 Tex., 184 (1895).*—Houck & Dieter, partners, and two others formed the El Paso Lager Beer Co. for the purpose of selling beer in El Paso and tributary markets, providing that the firm was to handle no beer except through the members, each of whom was to furnish a certain proportion of the whole at an agreed price. By contract with the Anheuser-Busch Brewing Association, Houck and Dieter were to have the exclusive privilege of selling at wholesale in El Paso the keg beer manufactured by said association. In a suit by the brewing association to recover for beer sold on account, Houck & Dieter by cross action set up the exclusive contract, alleged a breach, and recovered a sum over and above the plaintiff's demand. On appeal, held that the contract creating the Lager Beer Co. showed upon its face a combination prohibited by the antitrust law of 1889, that the law was constitutional, and that Houck & Dieter could not recover on their cross action for a breach of contract the performance of which would have aided them in carrying out the unlawful enterprise. Held further, that if the brewing association's agent at the time the exclusive sale contract was renewed knew of the unlawful combination it should not recover, but if the agent had no authority to make such a contract, and if the association, with a knowledge of the facts, did not ratify the act of its agent it should recover. (Act of 1889 somewhat similar to that of 1903 above cited.)

Massachusetts prohibits every contract, agreement, etc., in violation of the common law in that thereby a monopoly in the manufacture, production, or sale of any article or commodity in common use may be created or maintained.[1]

In California the legislature declares that the purpose of the anti-discrimination law is "to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented." [2]

Section 3. Restraint of trade.

CONSTITUTIONAL PROHIBITIONS.—Three States have constitutional provisions regarding restraint of trade, viz, Louisiana, Oklahoma, and New Mexico. The constitution of Louisiana (art. 190, adopted Nov. 22, 1913) prohibits all combinations, trusts, or conspiracies in restraint of trade. The constitution of Oklahoma (Art. V, sec. 44) directs the legislature to define an unlawful combination, monopoly, trust, act, or agreement in restraint of trade, and to enact laws to punish persons engaged in any such combination, etc., in restraint of trade. The constitution of New Mexico (art. 4, sec. 38) directs the legislature to enact laws to prevent combinations in restraint of trade.

STATUTORY PROHIBITIONS.—North Dakota prohibits combinations of capital, skill, or acts, by two or more persons, corporations, etc., to create or carry out restrictions in trade.[3] South Dakota has a similar prohibition, except that the words "or acts" are omitted.[4] California[5] and Ohio have in their statutes the same provisions found in the North Dakota law, with the addition of the words "or commerce," reading, "restrictions in trade or commerce."[6] Michigan substitutes

[1] Massachusetts, Laws 1908, chap. 454, sec. 1.

Merchants' Legal Stamp Co. v. *Murphy et al., 107 N. E., 968 (Mass., 1915).*—Plaintiff was engaged in the business of issuing trading stamps to merchants, and controlled nearly 90 per cent of the business conducted in this form by merchants of Boston and vicinity. Plaintiff retained title to stamp books and stamps, and merchants agreed not to part with them except in the course of trade and to return books with stamps attached when presented by purchasers; otherwise forfeiting all rights under the contract. Plaintiff also declined to supply stamps to merchants unless they stipulated not to use stamps issued by other companies or individuals. An action based on this contract was dismissed, the court holding that the direct and intended effect of the methods employed being to restrain or prevent the pursuit by the defendants or of others of a similar enterprise in a lawful manner, the plaintiff is within the prohibition of section 1, chapter 454, Laws of 1908. (See also Merchants' Legal Stamp Co. *v.* Scott, 107 N. E., 969.)

[2] California, Laws 1913, chap. 276, sec. 7. See also local price discrimination (p. 187).

[3] North Dakota, Laws 1907, chap. 259, sec. 2.

[4] South Dakota, Laws 1909, chap. 224, sec. 1.

[5] In the laws of California and Colorado it is provided that "no agreement or association shall be deemed to be unlawful or within the provisions of this act, the object and business of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which can not otherwise be so marketed; provided further, that it shall not be deemed to be unlawful, or within the provisions of this act, for persons, firms, or corporations engaged in the business of selling or manufacturing commodities of a similar or like character to employ, form, organize or own any interest in any association, firm or corporation having as its object or purpose the transportation, marketing or delivering of such commodities." (California, Laws 1907, chap. 530, sec. 1, as amended by Laws 1909, chap. 362, sec. 1; Colorado, Laws 1913, chap. 161, sec. 1.)

[6] California, Laws 1907, chap. 530, sec. 1; Ohio, G. C., sec. 6391.

the word "arts" for "acts" and adds "or commerce" after "restrictions in trade."[1] Arizona, Colorado,[2] and Kansas have prohibitions similar to those in the California law, but adding after "restrictions in trade or commerce," the words, "or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State."[3]

Texas further adds the words "or in the preparation of any product for market or transportation," reading, "restrictions in trade or commerce or aids to commerce or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this State."[4]

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[1] Michigan, P. A. 1899, No. 255, sec. 1.

[2] See note 5, p. 150.

[3] Arizona, Laws 1912, chap. 73, sec. 1; Colorado, Acts 1913, chap. 161, sec. 1; Kansas, Laws 1897, chap. 265, sec. 1, G. S., sec. 5142.

[4] Texas, Laws 1903, Chap. XCIV, sec. 1.

S. S. White Dental Mfg. Co. v. *Hertzberg, 51 S. W., 355 (Texas Court of Civ. App., 1899).*—Plaintiff made a contract with defendant by which the latter was to have the exclusive agency and right to sell any and all dental goods manufactured or kept in stock by plaintiff, and was not to sell any other line of dental goods. Plaintiff sued on account for balance due by defendant. A judgment for defendant, on the ground that the contract was in restraint of trade under the laws of Texas was affirmed, and a motion for rehearing overruled, the court holding that although the sale and delivery to defendant was an interstate transaction, it was nevertheless subject to the trust laws of the State.

Fort Worth & Denver City Ry. Co. v. *State, 99 Tex., 64 (1906).*—Held, that a contract between a railway and the Pullman Co. for the exclusive operation of the sleeping cars of the latter upon trains over the lines of the former was not a violation of section 1 of the antitrust law of 1903, where it did not fix the cost of transportation on such cars, leaving same to be fixed and changed by the sleeping-car company with the restriction only that it should not exceed the charges for such services on competing roads, and where there was no pooling or combination of rates. Such contract did not restrict the free pursuit of a business authorized or permitted by the laws of the State, as the railway could discharge its duties to the public by furnishing its own coaches or contracting with another to furnish them and could make such contract exclusive because no other corporation had a right to demand that its cars be attached to the trains of the railway company. Such exclusive contract did not constitute a monopoly under the law of 1903, as it neither brought the direction of the affairs of the two corporations under one management or control nor did one acquire thereby the shares, etc., or physical properties of the other.

Forrest Photographic Co. v. *Hutchinson Grocery Co., 108 S. W., 768 (Texas Court of Civil Appeals, 1908).*—The Forrest Photographic Co. contracted to furnish the Hutchinson Grocery Co. with trading tickets, each entitling its holder to an art calendar at the photographic company's studio when countersigned by the grocery company, and it was further agreed that from the date of the contract the photographic company should not, without the consent of the grocery company, or until the disposal of the tickets furnished, sell any other local grocery company any of such tickets. The photographic company sued to recover money due under terms of the contract. A judgment for defendant was reversed on appeal and the case remanded, the court holding that such a contract would not be void at common law as in restraint of trade nor was it within the act of 1903 prohibiting trusts, monopolies, and conspiracies in restraint of trade, because the contract was essentially one of services to the grocery company rather than for the sale of an article of merchandise, produce, or commodity.

Gust Feist Co. v. *Albertype Co., 109 S. W., 1139 (Tex., 1908).*—The Albertype Co. made a written contract with the Gust Feist Co. for the manufacture and sale of albums containing views of the city of Galveston, in which it was stipulated that the latter should have the exclusive control and resale of the albums. Suit was brought for the purchase price of albums sold under the agreement. On appeal a judgment for the plaintiff was reversed and the action dismissed, the court holding that the contract was within the Antitrust Law of 1903 prohibiting combinations in restraint of trade, that the parties were in pari delicto, and that neither could, therefore, invoke the aid of the courts.

Jersey-Creme Co. v. *McDaniel Bros. Bottling Co., 152 S. W., 1187 (Tex., 1913).*—A contract giving the bottling company the exclusive right to bottle "Jersey-Creme," a drink, in certain territory, by which said company agreed to use appellant's copyrighted labels and bottles and to buy the sirup for making such a drink from appellant, was a conspiracy in restraint of trade within the antitrust law of 1903 defining such conspiracy as an agreement between two or more engaged in selling or buying any article of merchandise, produce, or commodity to refuse to buy or sell to any other person; the bottles and labels being only incidentals, and "Jersey-Creme" being a "commodity" or "article of merchandise," and since it indirectly conferred upon appellee the exclusive right to purchase and resell the sirup.

Montana prohibits any combination or contract to create or carry out any restriction in trade.[1]

Minnesota prohibits pools, trust agreements, combinations, or understandings in restraint of trade within the State or between the people of this or of any other State or country.[2]

Alabama prohibits any person or corporation, domestic or foreign, from restraining, or attempting to restrain, the freedom of trade or production.[3]

South Carolina prohibits persons or corporations engaged in buying or selling any article or thing from entering into "any * * * agreement * * * or understanding to control or limit the trade in any such article or thing." [4]

In addition to the provisions noted above, Texas also prohibits as conspiracies in restraint of trade—

1. An agreement or understanding between two or more persons, corporations, etc., engaged in buying or selling any article of merchandise, produce, or commodity to refuse to buy from, or sell to, any other person, corporation, etc.

2. An agreement between two or more persons, firms, etc., to boycott, or threaten to refuse to buy from, or sell to, any person, firm, etc., for buying from, or selling to, any other person, firm, etc.[5]

Mississippi prohibits combinations, contracts, or agreements, expressed or implied, in restraint of trade.[6] The same section also prohibits any corporation, individual, etc., from restraining or attempting to restrain the freedom of trade or production.

Missouri prohibits any pool, trust, agreement, combination, or understanding in restraint of trade in the importation, transporta-

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[1] Montana, Laws 1909, chap. 97, sec. 1.

[2] Minnesota, Stats. 1913, sec. 8973.

[3] Alabama, Code 1907, sec. 7581.

Doherty & Co. v. *Rice et al., 186 Fed., 204 (1910).*—Defendant, Rice, contracted with complainant, Doherty & Co., of New York, to sell and deliver to them 800 out of 1,000 outstanding shares of the capital stock of the Citizens' Light, Heat & Power Co., of Montgomery, Ala., which were controlled by him. He further agreed to endeavor to secure and deliver the remaining 200 shares. Doherty & Co. also owned the majority of the stock and controlled the operations of the Montgomery Light & Water Power Co., a competitor of the first-mentioned light company. On suit being brought for specific performance of the contract, defendants contended that it was contrary to public policy and void, as tending to create an unlawful monopoly and stifle competition, and was therefore forbidden by the laws of Alabama. Held, that the contract was not void under the State constitution or the Code of Alabama, 1907, sections 3481, 3640, 7579, 7580, and 7581 (affirmed in Circuit Court of Appeals, 184 Fed., 878 [1911]).

[4] South Carolina, Laws 1902, No. 574, sec. 5.

[5] Texas, Laws 1903, Chap. XCIV, sec. 3.

[6] Mississippi, Code 1906, sec. 5002, as amended by Laws 1908, chap. 119, sec. 1.

Grenada Lumber Co. v. *Mississippi, 217 U. S., 433 (1910).*—A majority of the retail lumber dealers in Mississippi and Louisiana organized an association and pledged themselves to buy only from manufacturers and wholesalers who did not sell direct to consumers in communities where there were retail lumber dealers who carried stock commensurate with the demands of their communities, and not to buy from commission merchants, agents, and brokers, who sold to consumers but did not carry stocks, nor from a manufacturer who sold to such commission merchants, etc., and to inform each other of any sales made by manufacturers or wholesalers who sold to consumers. In a proceeding in equity under section 5002 Mississippi Code, this was held a combination in restraint of trade and intended to hinder competition in the sale and purchase of a commodity. The association was dissolved and injunction granted against further operations. The decree was affirmed by the State supreme court. On appeal to the Supreme Court of the United States, it was held that the statute as applied in this case was constitutional, not being in conflict with the fourteenth amendment to the Constitution of the United States.

tion, manufacture, purchase, or sale, in the State, of any product, commodity, article, or thing whatsoever.[1]

[1] Missouri, R. S., chap. 98, sec. 10298, as amended in 1913.

Heim Brewing Co. v. *Belinder, 71 S. W., 691 (Mo., 1903).*—Plaintiff and the other brewery corporations of Kansas City, Mo., agreed not to sell to any one who was in debt for beer to any of the others. Plaintiff sued the defendant for beer sold on account. Defendant urged that the agreement was in violation of the Antitrust Law. A judgment for plaintiff was reversed on appeal, the court holding that the agreement was in conflict with the Missouri statute relating to pools and trusts.

Finck et al., Trustees, Appellants, v. *Schneider Granite Co., 187 Mo., 244 (1905).*—Five concerns manufacturing practically all the crushed granite sold in St. Louis for concrete sidewalk uses, organized a corporation, with a nominal capital and with their officers as sole stockholders, to purchase and sell crushed granite at a time when there was an unusual demand. The five concerns entered into separate agreements with this corporation to sell to it at a stipulated price all their product with a fixed penalty per ton for any sold to outsiders. Thereafter all sales were made to the public in the name of the nominal company which kept a record of sales, received the money, and distributed the profits. The price of crushed granite was increased 80 cents per ton when these agreements went into effect and maintained until one of the parties refused to be bound longer, when the price fell to the old level. On suit being brought to recover the penalty from a company which violated the agreement, it was held that the agreements were void, being necessary links in a combination in restraint of trade, which was illegal under the statutes of 1889 and 1891; and that a corporation, ostensibly organized for a legal purpose, may be attacked collaterally to show that it is used to cover unlawful conspiracy.

State v. *Kansas City Live Stock Exchange et al. and Traders' Live Stock Exchange et al., 109 S. W., 675 (Mo., 1908).*—Defendants were voluntary associations, the members of which were engaged in and practically controlled the live-stock trade at Kansas City, Mo. The members of the Kansas City Exchange were chiefly commission merchants, while those of the Traders' Exchange were buyers and speculators. The rules of the Traders' Exchange provided in effect that no one should deal in live stock in the Kansas City market unless a member of said exchange. It was alleged that in conformity with said rules the members of the Traders' Exchange refused to deal with persons or corporations not members, and by boycotts and threats of boycotts so intimidated members of the Kansas City Live Stock Exchange that they would not deal with those not members of the Traders' Exchange. Violations of sections 8978 and 8979, Revised Statutes, 1899, and the common law were charged and an injunction to restrain such practices prayed for. The lower court sustained a demurrer on the part of defendants. On appeal the State supreme court affirmed the judgment as to the Kansas City Exchange, but overruled it as to the Traders' Exchange. The court expressed the opinion that the conditions complained of would be corrected if an injunction issued against the members of the Traders' Exchange only, since the refusal of the members of the Kansas City Exchange to trade with others than members of the Traders' Exchange was due to fear of boycott by members of the latter.

State v. *Standard Oil Co. et al., 116 S. W., 902 (Mo., 1909).*—The respondents, the Standard Oil Co. of Indiana, Waters-Pierce Oil Co., and Republic Oil Co., which companies controlled more than 85 per cent of the oil business of Missouri, acquired a knowledge of all sales by independent oil dealers through a system of espionage. They then limited the independents' share of the aggregate business of the State to 10 or 15 per cent by offering rebates to customers of the independents and cutting prices. Prices were published by the Waters-Pierce Co. which were followed by all the respondents and also the independents generally. Two of the respondents, the Standard Oil Co. of Indiana and the Waters-Pierce Co., divided the State into two districts and agreed not to sell in each other's territory. The Standard Oil Co. of Indiana was both a dealer and a manufacturer, and in its capacity as a manufacturer it agreed not to sell to any dealer but the Waters-Pierce Co. in said Waters-Pierce territory; it agreeing in return not to purchase from any other refiner, and both agreeing not to sell to any other dealer except at retail prices. The Republic Oil Co. had no fixed territory, posed as an independent and sold anywhere. It was used largely as the instrument by which the fight was waged against the independents. The Republic Oil Co. was a subsidiary of the Standard Oil Co. of New Jersey, and was organized as a successor to the largest competitor of the other respondents, this competitor having been taken over by the New Jersey company. The New Jersey company also owned practically all the stock of the Standard Oil Co. of Indiana, and 60 per cent of the stock of the Waters-Pierce Co. In proceedings on information in the nature of quo warranto it was held that the respondents had violated the State statutes and a judgment of ouster was entered as to all three corporations, but this was later suspended as to the Waters-Pierce Co., a domestic corporation, upon proof of their compliance with certain requirements of the judgment.

Pope-Turnbo v. *Bedford, 127 S. W., 436 (Mo., St. Louis Court of Appeals, 1910).*—The parties to this suit entered into a contract by which plaintiff was to teach defendant her method of treatment of the scalp and hair and the use of certain hair remedies, in consideration of which defendant agreed (1) not to use any hair remedies but plaintiff's in connection with said treatment, (2) not to mention having learned plaintiff's method of treatment except in connection with use of her remedies, (3) if defendant taught such method to any other party it was only to be after obligating said party to a similar contract. After making this contract, defendant used some of her own remedies instead of plaintiff's in connection with the treatment and advertised both verbally and in the press as a pupil of plaintiff after she had ceased to use plaintiff's remedies. It developed that the only part of the process of treatment not a common method was the use of plaintiff's remedies. Held, that the agreement not to use any but plaintiff's remedies was in restraint of trade and fostered monopoly, and that it was unreasonable at common law and in contravention of

Nebraska and Idaho prohibit restraint of trade by adopting section 1 of the Sherman Antitrust Law, but limiting its application to com-

the statute. (Sec. 8966, Mo. Ann. St., 1906, p. 4152.) An injunction was granted, however, restraining the defendant from advertising herself as a pupil of the plaintiff unless she used the plaintiff's preparations and also from mentioning to her patients the fact that she had learned the plaintiff's method of treatment.

State v. *Arkansas Lumber Co. et al., 169 S. W., 145 (Mo., 1914).*—This was a proceeding in quo warranto to oust the defendants, members of the Yellow Pine Manufacturers' Association, from doing business in the State of Missouri. The court found that the association fixed, maintained, and advanced prices of yellow pine, mainly by the issuing of market reports and a so-called "price current," curtailed production by agreements and concerted movements, and that it was in alliance with the Southwestern Lumbermens' Retail Association, the Lumber Secretaries' Bureau of Information, and the National Lumber Manufacturers' Association, by which alliance said defendants either themselves (1) divided territory among retail dealers, (2) agreed not to sell so-called "poachers," farmers' cooperative yards, and consumers, or (3) agreed to sell only to so-called legitimate retail dealers, who were members of or under the protection of the said Southwestern Association, or consorted, with knowledge of the fact, with those who did these things. A number of the defendants were found to have violated the State antitrust law, fines were imposed, and a conditional ouster decreed dependent upon good behavior, the payment of the fines, and the making of affidavits to discontinue all practices held to be in violation of the antitrust laws of the State. As to certain defendants, additional fines were to be imposed upon any failure to comply with any of these conditions, or upon the infraction of any law of the State. The final judgment was in part as follows: "The writ of ouster from corporate rights and franchises will be suspended as to all of the respondents, who within thirty days from this date shall have paid to the clerk of this court one-half of the fine or portion of the fine it is required to pay, and who within sixty days from date shall have paid the remaining one-half, and the costs of this proceeding, and who shall have, at the end of such sixty days, complied with the following conditions: (1) That they have paid the fine and costs as above stated and (2) that such respondents show by competent evidence, by way of affidavits from its managing officers the following things: (a) that such respondents or respondent has withdrawn from the Yellow Pine Manufacturers' Association, and from all associations of a like character; (b) that such respondents or respondent have no officer, agent, director, stockholder, or employee which is a member of such Yellow Pine Manufacturers' Association, or one of similar import or character; (c) that such respondents or respondent will not in the future become a member of such association or any similar association, or permit any officer, agent, director, stockholder, or employee to become a member thereof; (d) that such respondents or respondent will in the future sell lumber in Missouri in open and honest competition with all other wholesale dealers in lumber; (e) that such respondents or respondent will not discriminate between buyers of lumber and other material sold by them, and will treat all purchasers alike, and such respondents will not agree in any way to discriminate against purchasers; (f) that such respondents or respondent have and will discontinue the practice of blacklisting any retail dealer who sells or undertakes to sell within the territory of another retail dealer, and to this end will discontinue the publication of any credit report based upon the idea that any retail dealer is one who has been selling in the territory of another retail dealer; (g) that such respondents or respondent will give no recognition to the demands of any organization of retail dealers, but will treat all retail dealers alike in making sales to them, whether such purchaser is a member of a retail dealers' association or not; (h) that such respondents or respondent will not be a party to any agreement or understanding to control the amount of the production of lumber; (i) that if any retail dealers' association or one or more retail dealers undertake, with respondents or any respondent, to inaugurate any system or systems by which honest and real competition in the sale of lumber, by retail or wholesale, in the State, is or will be restricted, such respondent or respondents will promptly lay all such facts before the Attorney General of this State; (j) that such respondents or respondent will not be a party to the publication or circulation of any price current, except such a price current as gives actual and bona fide sales of such products and the prices paid therefor, for the honest information of dealers therein; (k) that such respondents or respondent are not now engaged in, and will not in the future engage in any practice or practices which violate either the letter or spirit of the antitrust laws of this State."

International Harvester Co. of America v. *State of Missouri, 237 Mo., 369; 234 U. S., 199 (1914).*—In a proceeding in the nature of quo warranto, in the State supreme court, charging a violation of the statutes of 1899 and 1909 (sec. 8966, R. S., 1899, and sec. 10301, R. S., 1909), it was alleged that in 1902 and 1903 the principal companies engaged in the harvesting machinery business in the United States were merged into one company, the International Harvester Co. (of New Jersey). This company limited its operations to manufacturing and made the Milwaukee Harvester Co., one of the principal companies merged, its selling agent under the name of the International Harvester Co. of America. It was alleged further that the combination was designed to lessen, and tended to lessen, free competition in the manufacture and sale of agricultural implements and that the selling company compelled the retail dealers of Missouri who desired to act as agents to refrain from selling implements of competitors, and thus secured from 85 to 90 per cent of the business. It was held that the International Harvester Co. (of New Jersey) was an unlawful combination to suppress competition and regulate prices within the meaning of the statute, but as it was not a party to the suit, the selling company only could be reached, and its license to do business in the State was revoked and a fine imposed. On writ of error from the United States Supreme Court the Missouri antitrust statutes were held to be constitutional and judgment affirmed, the court declaring that it was not a violation of the fourteenth amendment to the Federal Constitution for a State to forbid combinations of competing dealers, including those formed with good intentions and having some good effects or to pass legislation embracing vendors of commodities and not vendors of labor and services, such a classification not being unreasonable and arbitrary.

merce within the State; and the substance of this section, limiting it to intrastate commerce, has been adopted in Maine and Wisconsin.[1]

The Louisiana statutes contain substantially the same provision regarding restraint of trade as is found in the laws of Nebraska and Idaho, the only difference being that the words "or otherwise" are omitted.[2] The laws of this State also prohibit any combination, agreement, or arrangement to create or carry out restrictions of trade.[3]

Oklahoma prohibits "every act, agreement, contract or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this State which is against public policy." [4]

Porto Rico prohibits "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade, commerce, business transactions, and lawful and free competition in a town, or among the several towns of Porto Rico." [5]

Indiana prohibits "every scheme, design, understanding, contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, or to create or carry out restrictions in trade or commerce."[6]

New Mexico prohibits every contract or combination having for its object, or which shall operate, to restrict trade or commerce.[7]

New York prohibits any corporation from combining with any other corporation or person for the unlawful restraint of trade.[8]

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[1] Nebraska, Laws 1905, chap. 162, sec. 1; Idaho, Laws 1911, chap. 215, sec. 1; Maine, Laws 1913, chap. 106, sec. 1; Wisconsin, Stats. 1913, sec. 1747e.

State v. *Adams Lumber Co., 81 Nebr., 593 (1908).*—Defendants were members of the Nebraska Lumber Dealers' Association, the articles of which provided, among other things, that members "may" notify the secretary of any sale by a manufacturer or wholesaler to any consumer within the territory of such member. On being so notified, it was the practice of the secretary to write such wholesaler, etc., for an explanation of the sale. The association, its officers and directors were enjoined from this practice or any others which tend to prevent or preclude full and free competition in the sale of lumber and building materials in the State or to stifle competition or restrain commerce in such articles.

Bratt v. *Swift et al., 99 Wis., 579 (1898).*—Action for damages, founded on chapter 219, Laws 1893 (similar to Stats. 1913, sec. 1747e). Plaintiff alleged that he was a retail butcher at Superior; that on account of the interference of defendants he was forced to sell out and abandon his business; that defendants had entered into an agreement and conspiracy in restraint of trade, to menace, hinder, and control plaintiff's business, which combination was called the "Retail Butchers' Association," some of the purposes of which were to monopolize the sale of meats in Superior at the expense of the people and to control and manage that trade solely in their own interests and in the interests of others united with them, and to coerce plaintiff into joining said combination or to drive him from business in case he refused to join; and to that end certain defendants reported that he had been guilty of unmercantile conduct, promoting excessive competition, house-to-house peddling, selling adulterated goods, etc., in consequence of which the defendant packing companies refused to sell to plaintiff meats or other goods except for prices far above those at which they sold to other defendants, and in excess of the market price, and in pursuance of said scheme the retail butchers refused to sell plaintiff except at excessive prices, etc., in consequence of which plaintiff became unable to purchase meats and other necessary goods, was forced to sell out at a loss and was prevented from engaging in the retail butcher business and from earning a living. There was evidence tending to sustain the allegations and the jury found for plaintiff. The case was reversed on a question of damages.

[2] Louisiana, Laws 1890, act 86, secs. 1, 2.

[3] Louisiana, Laws 1892, act 90, sec. 1.

[4] Oklahoma, Laws 1908, p. 750, sec. 1.

[5] Revised Statutes and Codes of Porto Rico, 1911, sec. 2373.

[6] Indiana, Laws 1907, chap. 243, sec. 1.

[7] New Mexico, C. L. 1897, sec. 1292.

[8] New York, S. C. L., sec. 14.

North Carolina prohibits (1) every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, in the State; and (2) every such contract, etc., in restraint of trade or commerce which violates the principles of the common law. Every such contract is declared to be unreasonable unless the parties can show affirmatively that it does not injure the business of any competitors or prevent any one from becoming a competitor because his or its business will be unfairly injured by reason of any such contract, etc.[1]

New Jersey prohibits combinations or agreements to create or carry out restrictions in trade (or to acquire monopoly) either in intrastate or interstate business or commerce;[2] and prohibits any corporation from purchasing the stock of any other corporation, or any property, for the purpose of restraining trade or commerce.[3] This State prohibits also the organization of any domestic corporation to be used in restraint of trade (or in creating a monopoly), or any officer, director, manager, or employee of any corporation organized under its laws from using such corporation, directly or indirectly, to restrain trade (or acquire a monopoly), when such corporation engages in interstate or intrastate commerce.[4]

Massachusetts requires the attorney general to take cognizance of all violations of law or orders of courts, tribunals, or commissions affecting the general welfare of the people, including combinations, agreements, and unlawful practices in restraint of trade.[5]

A Vermont statute provides that no corporation shall be organized with a capital stock of over $10,000,000, nor shall the capital stock of any corporation be increased to over this amount, until there has been a determination by a judge of the supreme court that such organization, or increase in capital stock, is not liable to result in restraining competition in trade.[6]

A Kansas statute prohibits and declares to be in restraint of trade (*a*) any agreement, expressed or implied, or combination by which any shipper of seeds, grain, hay, or live stock is defrauded out of any portion of the net weight of any consignment of grain, seeds, etc.;[7] (*b*) any agreement, expressed or implied, made by any person as agent for any person, firm, or corporation, stipulating that grain, seeds, or hay shall not be shipped by the producer or local buyer unless accompanied by warehouse receipts, or that the same shall in any

[1] North Carolina, Laws 1913, chap. 41, secs. 1, 2, 3.
[2] New Jersey, Laws 1913, chap. 13, sec. 1.
[3] New Jersey, Laws 1913, chap. 15, sec. 1. See also New Jersey, Laws 1913, chap. 18, as amended by Laws 1915, chap. 114, noted under "Holding companies," p. 200.
[4] New Jersey, Laws 1913, chap. 16.
[5] Massachusetts, Laws 1913, chap. 709, sec. 1.
[6] Vermont, Pub. Stats., 1906, sec. 4311, as amended by Laws 1910, No. 143, sec. 4.
[7] Kansas, Laws 1899, chap. 293, sec. 1; G. S., sec. 5177.

manner be under the control of any warehouseman or agent as a condition precedent to the marketing of such grain, etc.[1]

The Georgia Code declares "contracts in general in restraint of trade" to be unenforceable.[2]

A Michigan statute declares all agreements and contracts by which any person, corporation, etc., agrees not to engage in any avocation, employment, pursuit, trade, profession, or business, whether reasonable or unreasonable, partial or general, limited or unlimited, to be against public policy and illegal and void. It is provided, however, that the statute shall not apply to contracts where the only object of the restraint is to protect the vendee or transferee of a trade, profession, business, etc., or the good will thereof, sold and transferred for a valuable consideration, in good faith, and without any intent to create or maintain a monopoly.[3]

California, Oklahoma, and South Dakota declare void contracts restraining anyone from exercising a lawful profession, trade, or business, except that one who sells the good will of a business may agree with the buyer not to carry on a similar business within a specified county, city, or a part thereof, so long as the buyer, or any person deriving title to the good will from him carries on a like business therein, and partners may, before dissolution, agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof.[4]

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[1] Kansas, Laws 1899, chap. 293, sec. 3; G. S., sec. 5179.

[2] Georgia, Code 1911, sec. 4253.

[3] Michigan, P. A., 1905, No. 329, secs. 1, 6.

Grand Union Tea Co. v. *Lewitsky, 116 N. W., 1090 (Mich., 1908).*—Defendant was employed by complainants to solicit orders for and deliver its goods over a certain route in Detroit, Mich., agreeing that if he left complainant's employ he would not engage in similar work in the city of Detroit or in any other place where he might have worked during his employment with the plaintiff, for one year after leaving its service. After leaving complainant's service, defendant entered the employ of a rival concern, whereupon complainants prayed an injunction. Defendant demurred, contending among other things, that the above agreement was against public policy, void, and illegal. A judgment sustaining the demurrer was affirmed, the court holding that such contracts were invalid under the provision of act No. 329, public acts of 1905, and that the statute was not in conflict with the fourteenth amendment of the Federal Constitution.

[4] California Civ. Code, secs. 1673 to 1675; Revised Laws, Oklahoma, secs. 978 to 980; South Dakota Civ. Code, secs. 1277 to 1279.

Vulcan Powder Co. v. *Hercules Powder Co. et al., 96 Cal., 510 (1892).*—Several California powder companies entered into a contract, for a term of three years, which provided that neither of the parties thereto should ship dynamite to any part of the United States east of a certain line and regulated the manufacture and sale of it in the territory west of this line as follows: (1) Each party was to sell only a certain per cent of the aggregate quantity sold by all; (2) where any party exceeded this proportion he was to pay to the other parties the profits on the excess; (3) a standing committee was given power to fix prices, regulate the manufacturing cost, impose fines for violations of the contract, etc. The contract was to terminate at any time, if any outside party should begin to manufacture and sell dynamite in competition with the contracting parties. Held, to be in violation of section 1673 of the Civil Code and therefore void.

Merchants' Ad-Sign Co. v. *Sterling, 57 Pac., 468 (Cal., 1899).*—Plaintiff corporation was engaged in the business of bill posting and other methods of advertising in Los Angeles. Defendant, who owned a number of shares of stock in the plaintiff corporation, sold his stock to one Wilshire, together with all his interest and good will in the corporation and agreed that he would not conduct, or assist in conducting, any bill-posting business in Los Angeles so long as Wilshire, or any person deriving title to the good will from him, should carry on a like business there. Wilshire then transferred the agreement to plaintiff. Some time after making the agreement plaintiff alleged that defendant helped to form the Los Angeles Bill Posting Co., became a stockholder therein, and conducted its business. In a suit to enjoin defendant from conduct-

A California statute provides that no person, corporation, etc., appropriating water for power purposes, shall enter into any agreement, combination, or trust in restraint of trade contrary to law, and if any works owned or operated by any licensee under this act shall be owned, leased, trusteed, possessed, or controlled by any device, permanently, temporarily, directly or indirectly, tacitly, or in any manner whatsoever, so that it or they form a part of or in any way effect any combination, or if it or they are in any wise controlled by any combination or conspiracy to limit the output of electricity or electrical or other power, or to increase or prevent the lowering of the price at which such electricity or power is sold, rented, or distributed, or in restraint of interstate or foreign trade in the generation, sale, or distribution of electricity or power, all rights to the appropriation of water shall be forfeited.[1]

In Wisconsin if any improvement maintained under any franchise granted pursuant to chapter 755, Laws of 1913, shall be owned, leased, trusteed, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that the same form part of, or in any way effect any combination, or shall be in any wise controlled by an unlawful trust, or form the subject of any contract or conspiracy to limit the output

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ing the business, it was held that a vendor of stock in a trading corporation has no vendible interest in the good will of the business and can not transfer such good will; and that the agreement was void, being in violation of the Civil Code, sections 1673, 1674, and 1675.

Hulen v. *Earel, 73 Pac., 927 (Okla., 1903).*—Plaintiff and defendant, who were physicians, practicing at Pond Creek, as copartners, entered into a written contract to dissolve the partnership, plaintiff purchasing the property of the partnership, and defendant agreeing not to practice medicine in the vicinity of Pond Creek. Held, that the contract was invalid, and in violation of sections 819, 820, and 821 of Wilson's Revised Statutes (now secs. 978 to 980, Revised Laws of Oklahoma).

Prescott v. *Bidwell, 99 N. W., 93 (S. Dak., 1904).*—Prescott & Bidwell were engaged in the land, loan, abstract, and insurance business in Mitchell, S. Dak. They dissolved partnership July 23, 1900, Bidwell buying the entire interest in the business, together with the good will and clientele. August 1, 1900, they made another agreement by which plaintiff bought the abstract books of the records of Davison County and other matter from the defendant for a certain sum, and it was further agreed that plaintiff should give defendant the use of the books and keep them in defendant's office; that defendant should not compile abstracts or engage in the abstract business in Davison County; and that plaintiff should not engage in the land, loan, or insurance business in said county. Soon after defendant engaged in the abstract business in violation of his agreement and suit was brought by plaintiff to recover damages. A judgment for plaintiff was reversed, the court holding that, as the parties were not partners at the time of the agreement of August 1, and as the good will had been sold under the first agreement, the restraint on defendant from engaging in the abstract business was in violation of Revised Civil Code, sections 1277, 1278, and 1279.

Public Opinion Publishing Co. v. *Ransom, 148 N. W., 838 (S. Dak., 1914).*—Defendant and one C. held a majority of the stock and were the active managers of a corporation carrying on a publishing and printing business in Watertown, Codington County, S. Dak. These parties with the authority of the corporation sold its business, good will, etc., to one B., and as part of the consideration personally agreed not to enter into similar business in Codington County for a period of 10 years. A forfeit of $5,000 as liquidated damages was to be paid if the agreement was violated. At the time of the sale it was understood that the plaintiff corporation was to be organized to take over the business purchased by B. Defendant having violated the agreement, suit was brought to recover the stipulated damages. A judgment overruling defendant's demurrer was sustained, the State supreme court holding that the agreement complied with the statute (S. Dak. Civil Code, sec. 1278) so far as territory was concerned, and that though the time was "10 years," instead of "so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein," the statute was not violated and the condition was reasonable.

[1] California, Laws 1911, chap. 406, sec. 28.

of any hydraulic or hydroelectric power derived therefrom or in any manner or in any degree in restraint of trade in the generation, sale, or distribution of hydraulic or hydroelectric power derived therefrom, the State may take possession as in cases of receivership, and the members of the Railroad Commission shall act as receivers during such period as the court may determine.[1]

In Washington, corporations not formed for profit are prohibited from entering into any agreement or combination in restraint of trade or which shall attempt to restrain trade.[2]

Section 4. Restraint of competition.

Restraint of competition as distinguished from restraint of trade is prohibited in 27 States.

CONSTITUTIONAL PROVISIONS.—The constitution of Alabama (sec. 103) requires, in substance, that the legislature provide for the regulation, prohibition, or reasonable restraint of common carriers, partnerships, associations, trusts, monopolies, and combinations of capital, that they may not prevent reasonable competition in any calling, trade, or business.

The constitution of Georgia (Art. IV, sec. 2) provides that the general assembly shall have no power to authorize any corporation to buy shares or stock in any other corporation, or to make any contract or agreement whatever with any such corporation, which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses.

The constitution of Wyoming (Art. X, sec. 8) prohibits the consolidation or combination of corporations to prevent competition.

The constitution of New Hampshire (art. 82) declares that "free and fair competition in the trades and industries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it," and grants to the general court the power to enact laws "to prevent the operations within the State of all persons and associations, and all trusts and corporations, foreign or domestic, and the officers thereof, who endeavor to raise the price of any article of commerce or to destroy free and fair competition in the trades and industries through combination, conspiracy, monopoly, or any other unfair means."

STATUTORY PROHIBITIONS.—Kansas, South Carolina, and Tennessee prohibit all arrangements made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into the State, or in the manufacture or sale of articles of domestic growth or of domestic raw material. Kansas in-

[1] Wisconsin Stats., 1913, sec. 1596-72.

[2] Washington, Remington & Ballinger's Code (1910), sec. 3762.

cludes also competition in transportation of articles and for the loan or use of money.[1]

Missouri has a substantially similar provision, including competition in transportation, in fire and storm insurance, and in the manufacture or sale in the State of anything bought and sold.[2]

California prohibits combinations of capital, skill, or acts (1) to prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce, or any commodity; or (2) to make any agreement by which they shall establish or settle the price of any article, commodity, or transportation between them or themselves and others, so as to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.[3]

Twelve States (Arizona, Kansas, Colorado, Louisiana, Michigan, Mississippi, New Jersey, North Dakota, Ohio, South Dakota, Nebraska, and Texas) have substantially similar laws.

Arizona and Kansas extend clause 1 so as to include competition in "aids to commerce." Clause 2 is likewise extended to include competition in "manufacture" as well as sale or transportation.[4]

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[1] Kansas, Laws 1889, chap. 257, sec. 1; South Carolina, Civil Code (1912), sec. 2437; Tennessee, Laws 1903, chap. 140, sec. 1.

Walter A. Wood Mowing & Reaping Co. v. *Greenwood Hdw. Co., 55 S. E., 973 (S. C., 1906).*—Plaintiff agreed to manufacture and sell to defendant certain farm machinery and to use reasonable diligence to prevent other agents from making sales of such machinery in Greenwood, S. C., and vicinity, and defendant agreed to canvass the territory thoroughly, not to accept the agency for or sell any other machines during the term of the contract, and to sell the machines for use only in said territory. Held, that the contract was not injurious to the public as tending to create a monopoly, nor a violation of the South Carolina Civil Code, 1902, section 2845 (same as Civil Code (1912,) sec. 2437), since competition and prices were not affected to an unreasonable extent. It was further held that the contract was valid under the common law.

Standard Oil Co. v. *State (Tenn.), 100 S. W., 705 (1907).*—An agent of the Standard Oil Co. gave a merchant 100 gallons of oil to countermand an order to a competitor. Held a violation of act of 1903. Corporation not indictable under statute, but may be counted as party to conspiracy and is subject to loss of right to do business in the State. Judgment against corporation reversed and agent fined.

Standard Oil Co. of Kentucky v. *Tennessee, 217 U. S., 413 (1910).*—The plaintiff in error sought to reverse a decree of the Supreme Court of Tennessee forbidding it to do business, other than interstate commerce, in that State. The ground of the decree was that the corporation and certain named agents entered into an agreement for the purpose and with the effect of lessening competition in the sale of oil at Gallatin, and with the further result of advancing the price of oil there. The transaction complained of was inducing merchants in Gallatin to revoke orders to a rival company for oil to be shipped from Pennsylvania, by an agreement to give them 300 gallons of oil. The decree was affirmed.

Baird v. *Smith, 128 Tenn., 410 (1913).*—Defendant sold to plaintiff the stock and fixtures of a store in Jellico, Tenn., and as part of the contract of sale bound himself to pay the plaintiff $1,000 should he (defendant) within five years enter any competing business in Jellico, other than that with which he was then connected. On suit being brought for breach of the agreement, the defendant urged that the contract was void as tending to lessen full and free competition in the sale of merchandise, within the meaning of chapter 140, Acts of 1903. Held, that the contract was not a violation of this act.

[2] Missouri, R. S., chap. 98, sec. 10301, as amended in 1913.

[3] California, Laws 1907, chap. 530, sec. 1.

[4] Arizona, Laws 1912, chap. 73, sec. 1; Kansas, Laws 1897, chap. 265, sec. 1.

State v. *Smiley, 65 Kans., 240 (1902).*—Proceeding under Kansas law of 1897. Defendant made an agreement with other grain dealers whereby the amount of grain to be bought by each party was limited. If any party purchased more than his allotted share, he agreed to pay to the others 3 cents a bushel for such excess. The contract was held to be in restraint of competition, and therefore illegal. Held, further, that the law did not violate fourteenth amendment of United States Constitution. On appeal the constitutionality of the law under the Federal Constitution was affirmed by United States Supreme Court (196 U. S., 447).

State v. *International Harvester Co. of America, 106 Pac., 1053 (Kans., 1910).*—Action by attorney general under acts of 1889, 1897, and 1899, to forfeit rights, privileges, etc., within the State. It was found that the company formerly used exclusive contracts but had ceased making them; that since then defendant tried by argument, persuasion, and in a few instances by threats, to prevent dealers from handling competitive goods. Ordered that defendant be prohibited from using exclusive contracts with its agents or dealers restraining them from handling competitive goods, and from making any unfair discrimination in the sale of its goods, against any section or between persons for the purposes of destroying competition.

Colorado, like Arizona, has extended clauses (1) and (2), and in addition has included "ores" in clause (1).[1]

The Louisiana law is substantially similar to that of California, except that the words "capital, skill, or acts" are omitted.[2]

The law of Mississippi varies from that of California in that it omits the words "capital, skill or acts," and clause (1) refers to "hindering competition" in the "production, importation," manufacture, transportation, sale, or purchase of a commodity. Clause (2) is omitted.[3] Mississippi provides that this chapter shall be liberally construed to the end that trusts and combines may be suppressed and the benefits arising from competition in business preserved to the people of this State.[4]

The New Jersey act resembles the California law in that clause (1) is substantially the same. Clause (2), however, is as follows:

> To make any agreement by which they directly or indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers, in the sale or transportation of any article or commodity, either by pooling, withholding from the market or selling at a fixed price, or in any other manner by which the price might be affected.[5]

North Dakota omits clause (1). Clause (2) is substantially the same.[6]

The law of South Dakota varies from that of California in that it omits the word "acts" after "skill," and omits clause (2). It prohibits, however, persons, corporations, etc., from fixing prices, limiting production, or regulating the transportation of any produce or commodity so as to "obstruct" or prevent competition.[7]

In Nebraska clause (1) includes "constructing" as well as manufacturing, making, etc. In Nebraska and Texas clauses (1) and (2) are extended to include the business of "insurance," and the law of Texas also includes aids to commerce and the preparation of products for market or transportation.[8]

The laws of Michigan and Ohio are substantially the same as in California, but Michigan substitutes the word "arts" for "acts."[9]

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[1] Colorado, Laws 1913, chap. 161, sec. 1.

[2] Louisiana, Laws 1892, act 90, sec. 1.

[3] Mississippi, Code 1906, sec. 5002, as amended by Laws 1908, chap. 119, sec. 1.

[4] Idem, chap. 5021.

[5] New Jersey, Laws 1913, chap. 13, sec.1; see also, New Jersey, Laws 1913, chap. 18, as amended by Laws 1915, chap. 114, noted under "Holding companies," p. 200.

[6] North Dakota, Laws 1907, chap. 259, sec. 2.

[7] South Dakota, Laws 1909, chap. 224, secs. 1-5.

[8] Nebraska, Stats., sec. 6281; Texas, Laws 1903, Chap. XCIV, sec. 1.

[9] Ohio, G. C., sec. 6391: Michigan, P. A. 1899, No. 255, sec. 1.

McCall Co. v. *O'Neil, 17 Ohio N. P. (N. S.), 17 (Nov. 12, 1914).*—Plaintiff entered into a contract with the Davis Pennell Co. under which the latter was to take and sell for a certain period plaintiff's patterns, etc. It was further agreed that the Davis Pennell Co. would not sell the patterns at retail for less than catalogue price. The rights and interests of the Davis Pennell Co. in the contract were taken over by the defendant. On breach of the contract, plaintiffs sued to recover certain amounts alleged to be due. Held, that plaintiff could not recover, as the contract was void under section 6391 of the General Code. The court further expressed the opinion that the rule would be the same even if the goods so sold were covered by patent.

While the above are the most usual types of statutes directed at restraint of competition, other laws have been adopted in various States, in some cases in addition to provisions above noted.

Alabama prohibits any person or corporation from destroying or attempting to destroy competition in the manufacture or sale of a commodity.[1]

Georgia prohibits insurance companies or their agents from making arrangements to prevent or lessen competition in the business of insurance transacted in that State.[2]

Michigan prohibits foreign insurance companies from directly or indirectly entering into any contract, undertaking, etc., the object or effect of which is to prevent open and free competition.[3]

Indiana prohibits contracts, combinations, etc., to prevent competition in manufacturing, within or without the State,[4] and contracts, combinations, etc., to stifle or restrict free competition for the letting of any contract for private or public work.[5] This State also prohibits all arrangements, etc., between persons or corporations who control the output of any article of merchandise, made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into the State.[6]

Iowa prohibits any person, corporation, etc., operating any business of buying, selling, handling, consigning, or transporting any commodity or article of commerce from forming, maintaining, or contributing to any pool, association, etc., for the prevention of full and free competition among buyers, sellers, or dealers in any commodity or any article of commerce.[7]

Massachusetts prohibits arrangements, combinations, etc., in violation of the common law in that thereby competition in that State in the supply or price of any article or commodity in common use is or may be restrained or prevented.[8]

Michigan prohibits contracts, understandings, etc., to restrict, limit, regulate, or destroy free and unlimited competition in the sale of any article of machinery, tools, implements, vehicles, or appliances designed to be used in any branch of productive industry.[9]

Minnesota prohibits combinations, understandings, etc., which prevent or limit competition in the purchase and sale of any article of trade, manufacture, or use, or which tend or are designed so to do.[10]

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[1] Alabama, Code, sec. 7581.
[2] Georgia, Code, sec. 2466.
[3] Michigan, Howell's Stats. (1913), secs. 8233, 8234.
[4] Indiana, Laws 1907, chap. 243, sec. 1.
[5] Ibid., sec. 3. See also Laws of Mississippi and Oklahoma under "Pooling," pp. 166, 168.
[6] Indiana, Stats., sec. 3878.
[7] Iowa, Laws 1909, chap. 225, sec. 1.
[8] Massachusetts, Laws 1908, chap. 454, sec. 1.
[9] Michigan, P. A. 1905, No. 229, sec. 1.
[10] Minnesota, Stats. (1913), sec. 8973.

Missouri prohibits agreements, combinations, etc., in restraint of trade or competition in the importation, transportation, manufacture, purchase, or sale of any product or commodity in the State, or any article or thing bought or sold.[1]

Missouri and South Carolina prohibit agreements, pools, combinations, etc., to control or limit the trade in any article or thing or to limit competition in such trade by refusing to buy from or sell to any other person, etc., for the reason that such person is not a member of such pool, etc.[2]

Montana prohibits combinations, contracts, etc., "to prevent competition in merchandise or commodities," or by which the parties settle the price of any article of merchandise, commerce, or products so as to preclude unrestricted competition.[3]

A Nebraska statute in substance prohibits persons, etc., dealing in, handling, or consigning grain, from forming, maintaining, or contributing to any pool, combination, etc., to prevent competition among buyers, sellers, or dealers in grain, or which hinders or prevents the fullest competition in the purchase, sale, or dealing in grain by persons, etc., not members of, or doing business through, such combinations, or to prevent competition by requiring members not to deal with shippers or dealers in grain not members of such pool, combination, etc.[4]

New York prohibits corporations combining with any other corporation or person for the prevention of competition in any necessary of life.[5] This State also prohibits agreements, combinations, etc., whereby competition in the State in the supply or price of any article or commodity of common use is or may be restrained or prevented.[6]

North Carolina in substance prohibits any person, corporation, etc., engaged in buying or selling in the State from having any agreement or understanding with any other person, etc., not to buy or sell within certain territorial limits within the State, with the intention of preventing competition in selling or to fix prices or prevent competition in buying within these limits. Agents are permitted to represent more than one principal, but two or more persons are not author-

[1] Missouri, R. S., chap. 98, sec. 10298, as amended in 1913.

[2] Idem, sec. 10300, as amended in 1913; South Carolina, Laws 1902, No. 574, sec. 5.

[3] Montana, Laws 1909, chap. 97, sec. 1.

[4] Nebraska, Laws 1897, chap. 80, sec. 1.

[5] New York, S. C. L., sec. 14.

[6] New York, Cons. Laws, Gen. Business Law, sec. 340.

Brooklyn Distilling Co. v. *Standard Distilling & Distributing Co., 120 N. Y. App. Div., 237 (1907).*—Plaintiff leased distillery to defendant company, and in defense of a suit to recover rent it was alleged that the lease was illegal and void, as it was made in violation of Laws 1897, chapter 383 (now Gen. Business Laws, sec. 340). From a judgment for plaintiff defendant appealed. Held, that the corporation could not escape liability for rent when there was no evidence that the landlord was a party to the combination. The statute does not prevent one from selling or leasing property, nor does it prevent one from buying or leasing property to prevent competition. It is designed to prevent the owners or controllers of property entering into a combination to regulate production and maintain prices for their mutual benefit according to their respective interests.

ized to employ a common agent for the purpose of suppressing competition or lowering prices.[1]

Texas also prohibits corporations from acquiring the shares, bonds, franchises, or other rights or properties of other corporations for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen, competition.[2]

Wisconsin prohibits corporations from entering into any combination, agreement, etc., intended to restrain or prevent competition in the supply or price of any article or commodity in general use in the State or constituting a subject of trade or commerce therein.[3]

Mississippi requires the charter or articles of association or the law under which a clearing house association is organized to prohibit it and its officers and managers from attempting to make or enforce any rule, regulation, agreement, or understanding in respect to "the restriction or regulation of competition between the members of the association or any of them in any matter or thing connected with the business conducted by such members or authorized to be done by them under their respective charters." [4]

Porto Rico prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade, commerce, business transactions, and lawful and free competition in a town, or among the several towns of Porto Rico." [5]

Section 5. Pooling.

DEFINITIONS.—Pools are prohibited in many States, and are defined by the laws of one, namely, North Dakota, where the term is a synonym of "trust."[6]

CONSTITUTIONAL PROHIBITIONS.—The constitution of Kentucky (sec. 198) requires the legislature to enact laws to prevent pools and other organizations "from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value."[7]

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[1] North Carolina, Laws 1913, chap. 41, sec. 5.

[2] Texas, Laws 1903, Chap. XCIV, sec. 2.

[3] Wisconsin, Laws 1907, p. 432, sec. 1791j.

[4] Mississippi, Laws 1914, chap. 124, sec. 65.

[5] Revised Statutes and Codes of Porto Rico, 1911, sec. 2373.

[6] North Dakota, Laws 1907, chap. 259, sec. 2.

[7] In 1890 Kentucky passed an antitrust statute (act of May 20, 1890, Carroll's Kentucky Stats., secs. 3915 to 3921) prohibiting agreements or combinations for the purpose of controlling the price or output of any article of commerce. A new State constitution, adopted in 1891, provided that the general assembly should enact such laws as necessary to prevent combinations for the purpose of depreciating below or enhancing the cost of any article above its real value (Const., sec. 198). In Commonwealth *v.* Grinstead (108 Kentucky, 59, 76) it was held that the constitutional provision did not repeal the act of 1890, as they were not inconsistent; on the contrary, the court was of the opinion that, in the absence of any other law, the legislature evidently considered the act of 1890 the law best calculated to enforce this provision of the constitution. In 1906 a statute authorized any number of persons to combine or pool crops of wheat, tobacco, corn, oats, hay, or other farm products raised by them for the purpose of obtaining a higher price than they could obtain by selling them separately (Laws, 1906, ch. 117, p. 429). In 1908 a statute reaffirmed the legality of such combinations, provided that the breach of such combination agreements might be re-

The constitution of Louisiana (art. 190, adopted Nov. 22, 1913) provides that it shall be unlawful for persons or corporations, or their legal representatives, "to unite or pool their interests for the purpose of forcing up or down the price of any agricultural product or article of necessity, for speculative purposes."

STATUTORY PROHIBITIONS.—Alabama prohibits any person or corporation from entering into any pool to regulate or fix the price of any article or commodity to be sold or produced within the State, or to fix or limit the quantity of any article or commodity to be produced, manufactured, mined, or sold in the State.[1]

Nine other States (Arkansas, Illinois, Iowa, Minnesota, Mississippi, Missouri, North Dakota, South Carolina, and Utah) have substantially similar laws.[2]

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strained by injunction, and made unlawful the sale by or purchase from an owner contrary to his agreement (Laws, 1908, ch. 8, p. 38).

In cases arising after the passage of the act of 1906 the State courts held that the act of 1890, the constitution of 1891, and the act of 1906 must be taken together, and by interaction and to avoid questions of constitutionality, were construed to make any combination for the purpose of controlling prices lawful unless for the purpose or with the effect of fixing a price that was greater or less than the real value of the article [Owen County Burley Tobacco Society *v.* Brumback, 128 Kentucky, 137 (1908); Commonwealth *v.* International Harvester Co. of America, 131 Ky., 551 (1909); Commonwealth *v.* Hodges, 137, Ky., 233 (1910); International Harvester Co. of America *v.* Commonwealth, 137 Ky., 668 (1910); Collins *v.* Commonwealth, 141 Ky., 564 (1911); International Harvester Co. of America *v.* Commonwealth, 144 Ky., 403 (1911); American Seeding Machine Co. *v.* Commonwealth, 152 Ky., 589 (1913)]. The State courts held the act of 1906 not to be in violation of section 3 of the Bill of Rights or of the fourteenth amendment to the Federal Constitution, as being class legislation, inasmuch as it did not expressly forbid persons other than producers of farm products from also combining for the purpose of obtaining higher prices [Owen County Burley Tobacco Society *v.* Brumback, 128 Ky., 137 (1908); Commonwealth *v.* International Harvester Co. of America, 131 Ky., 551 (1909)]. The State courts, in order to meet the contention that the term "real value" was not definite, declared that obviously the real value of any commodity was "its market value under fair competition and under normal market conditions" [Commonwealth *v.* International Harvester Co. of America, 131 Ky., 551 (1909); Commonwealth *v.* Hodges, 137 Ky., 233 (1910); International Harvester Co. of America *v.* Commonwealth, 137 Ky., 668 (1910); International Harvester Co. of America *v.* Commonwealth, 147 Ky., 564 (1912)].

Subsequently, however, the Supreme Court of the United States, in International Harvester Co. of America *v.* Commonwealth of Kentucky, 234 U. S., 216 (1914), held the antitrust provisions of the constitution and laws of Kentucky, as construed together by the highest court of the State, to be unconstitutional under the fourteenth amendment to the Federal Constitution, declaring that the "elements necessary to determine the imaginary ideal," "real value" as used in the statute, "are uncertain both in nature and degree of effect to the acutest commercial mind." In Collins *v.* Commonwealth of Kentucky, 234 U. S., 634 (1914), (see also Malone *v.* Commonwealth of Kentucky, 234 U. S., 639 (1914) the court said "that the statute in its reference to 'real value' prescribed no standard of conduct that it was possible to know; that it violated the fundamental principles of justice embraced in the conception of due process of law in compelling men on peril of indictment to guess what their goods would have brought under other conditions not ascertainable." These decisions render null and void Laws 1906, ch. 117, and apparently also section 198 of the State constitution, but perhaps do not affect the validity of Ky. Stats., secs. 3915-3921.

[1] Alabama, Stats., sec. 7579.

[2] Arkansas, Laws 1905, Act 1, as amended 1913, Act 161; Illinois, Laws 1891, p. 206, as amended in 1893 and 1907; Iowa, Stats., sec. 5060; Minnesota, Stats., sec. 8973; Mississippi, Code 1906, sec. 5002, as amended by Laws 1908, chap. 119, sec. 1; Missouri, R. S., chap. 98, as amended in 1913, sec. 10299; North Dakota, Laws 1907, chap. 259, sec. 1; South Carolina, Laws 1902, No. 574, sec. 1; Utah, Stats., sec. 1753.

Chicago, Wilmington & Vermilion Coal Co. et al. v. *People, 214 Ill., 481 (1905).*—The soft-coal operators of northern Illinois formed an association, one of the objects of which was to regulate and fix the price at which coal should be sold by its members. In a criminal action in the Cook County (Ill.) courts this was held a violation of section 46 of the Criminal Code and the Antitrust Act of 1891, and conspiracy under the common law. The decision was affirmed in both the appellate and supreme courts of the State.

State v. *Minneapolis Milk Co., 144 N. W., 417 (Minn., 1913).*—Minneapolis milk dealers who controlled a large percentage of the trade of the city formed a milk dealers' association and agreed to raise prices. It was charged that the agreement was a violation of section 5168, revised laws, 1905. The Minneapolis Milk Co., a corporation, and another defendant, one Ruhnke, demanded a separate trial. Both were convicted and fined. On appeal the judgment was sustained as to Ruhnke but modified as to the corporation by remitting the fine, on the ground that the statute provides specifically for forfeiture of the charter of a corporation convicted under the act and that it was not intended that both fine and forfeiture should be visited on a corporation.

Minnesota prohibits pools in restraint of trade or which regulate the price of any article "of trade, manufacture or use, bought and sold within the State," and further, prohibits pools, etc., which "prevent or limit competition" in the purchase and sale thereof.

The laws of Arkansas, Mississippi, Missouri, and South Carolina vary from that of Alabama in that they prohibit the regulation or the maintenance of the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining or any article or thing whatsoever, and apply also to the regulation of property insurance premiums.

The law of North Dakota differs from the Alabama statute principally in that it also prohibits fixing or limiting the amount or quantity of any article, commodity, etc., to be manufactured, mined, produced, "exchanged," or sold in the State.

Arizona prohibits combinations to pool any interests in connection with the manufacture, sale, or transportation of any article or commodity, that its price may in any way be affected.[1]

Nine other States (California, Kansas, Louisiana, Michigan, Nebraska, Ohio, Mississippi, North Dakota, and Texas) have substantially similar laws.[2]

The California, Louisiana, Michigan, North Dakota, and Ohio laws omit the word "manufacture."

In Nebraska the word "manufacture" is omitted and "production" substituted.

Mississippi extends the prohibition to interests in connection with the "importation, production or price" of a commodity.

In Texas the word "manufacture" is omitted, but the law extends the prohibitions to the pooling of interests in connection with the "purchase" of any article or commodity or the charge for insurance or for the preparation of any product for market, or transportation.

While the above are the commonest types of State laws against pooling, other forms have been adopted in various States, in some cases, in addition to one of the provisions above noted.

Iowa prohibits any person, corporation, etc., operating any business of buying, selling, handling, consigning, or transporting any commodity or article of commerce, from forming, entering, maintaining, or contributing to any pool for the prevention of full and free competition among buyers, sellers, or dealers in any commodity or any article of commerce.[3]

Missouri and South Carolina prohibit persons, corporations, etc., engaged in buying or selling any article or thing, from entering into

[1] Arizona, Laws 1912, chap. 73, sec. 1.

[2] California, Laws 1907, chap. 530, sec. 1; Kansas; Laws 1897, chap. 265, sec. 1, G. S., sec. 5142; Louisiana, Laws 1892, Act 90, sec. 1; Michigan, P. A. 1899, No. 255, sec. 1; Nebraska, R. S. (1913), sec. 4017; Ohio, G. C., sec. 6391; Mississippi, Code 1906, sec. 5002, as amended by Laws 1908, chap. 119, sec. 1; North Dakota, Laws 1907, chap. 259, sec. 2; Texas, G. L. 1903, Chap. XCIV, sec. 1.

[3] Iowa, Laws 1909, chap. 225, sec. 1.

any pool, etc., to control or limit the trade in any such article or to limit competition in such trade by refusing to buy from or sell to any other person or corporation such article or thing for the reason that such person or corporation is not a member of the pool.[1]

New Jersey prohibits agreements, and understandings without express agreement, by which the parties preclude free and unrestricted competition among themselves, or any purchaser or consumer in the sale or transportation of any article or commodity either by pooling or in any other manner by which the price might be affected.[2]

The following statutes relate only to pooling in certain lines of business or for special purposes:

Georgia prohibits pools to lessen competition in the business of insurance transacted in that State.[3]

Kansas and Nebraska prohibit combinations of grain dealers or others "for the pooling of prices of different and competing dealers and buyers, or to divide between them the aggregate or net proceeds of the earnings of such dealers and buyers, or any portion thereof."[4] Nebraska has also a substantially similar statute relating to combinations of dealers and sellers of coal or lumber.[5]

Another section of the Nebraska statutes in substance prohibits persons, etc., dealing in, handling, or consigning grain, from forming, maintaining, or contributing to, any pool for the prevention of competition among buyers, sellers, or dealers in grain, or which tends to prevent the fullest competition in the purchase, sale, or dealing in grain by persons, etc., not doing business through such pool, or the prevention of competition by requiring members not to deal with nonmembers, or which requires its members to refuse to sell, purchase, or consign grain to any person, etc., who purchases or receives grain from nonmembers, or which has for one of its objects the prevention of any person, etc., not shipping grain through elevators, whether operated by members or not, from finding purchasers, by boycotting, or threatening to boycott, such purchasers.[6]

Montana forbids warehousemen to enter into any contract, agreement, combination, or understanding with any other warehousemen at any railway station whereby the amount of grain to be received or handled by the warehouses at such station shall be equalized or pooled between said warehouses, or whereby the profits or earnings shall be divided or pooled or apportioned in any manner.[7]

[1] Missouri, R. S., chap. 98, sec. 10300, as amended in 1913; South Carolina, Laws 1902, No. 574, sec. 5.
[2] New Jersey, Laws 1913, chap. 13, sec. 1.
[3] Georgia, Code, sec. 2466.
[4] Kansas, Laws 1887, chap. 175, sec. 1; G. S., sec. 5182; Nebraska, Comp. Stats., sec. 7978.
[5] Nebraska, R. S. (1913), sec. 4026.
[6] Nebraska, Laws 1897, chap. 80, sec. 1.
[7] Montana, Laws 1915, chap. 69, sec. 1.

Mississippi prohibits combinations to prevent by pooling the separate and individual bidding for the performance of a public work for the State, or any county, municipality, or levee board thereof.[1]

Nebraska and Oklahoma prohibit combinations of bridge builders or contractors or others "for the pooling of prices of different competing bridge contractors or to divide between them the aggregate or net proceeds of the earnings of such contractors, or any portion thereof."[2]

Washington prohibits commission merchants from entering into any pool for the purpose of artificially raising or depressing the market price of any farm, dairy, orchard, or garden produce, or of excluding from the market the produce of any particular locality, grown or manufactured by any person within the State.[3]

Section 6. Price control.

CONSTITUTIONAL PROVISIONS.—The constitutions of Arizona (Art. XIV, sec. 15) and Washington (Art. XII, sec. 22) prohibit corporations, copartnerships, or associations of persons in the State from combining or making any contract with any incorporated company, copartnership, etc., or in any manner whatever, to fix the prices of any product or commodity.

The constitution of Louisiana (art. 190, adopted Nov. 22, 1913) declares that it shall be unlawful for persons or corporations, or their legal representatives, to combine or conspire together, or to unite or pool their interests, for the purpose of forcing up or down the price of any agricultural product or article of necessity for speculative purposes.

The constitution of Montana (Art. XV, sec. 20) forbids any corporation, person, etc., to form directly or indirectly any trust or make any contract for the purpose of fixing the price of any article of commerce, or product of the soil, for consumption by the people.

The constitution of Idaho (Art. XI, sec. 18) prohibits any corporation, association of persons, or stock company from directly or indirectly combining or contracting with any corporation for the purpose of fixing the price of any article of commerce or of the produce of the soil or of consumption by the people.

South Dakota (Const., Art. XVII, sec. 20) has a similar provision, except that it prohibits fixing the prices of "any product or commodity so as to prevent competition in such prices" or to establish excessive prices therefor.

The constitutions of Utah (Art. XII, sec. 20) and North Dakota (sec. 146) prohibit and declare unlawful and against public policy, any combination by individuals, corporations, or associations, hav-

[1] Mississippi, Code 1906, sec. 5008.

[2] Nebraska, R. S. (1913), sec. 4037; Oklahoma, Comp. Laws 1909, sec. 8820; see also Indiana Antitrus Law of 1907, sec. 3, under "Restraint of competition" (p. 162).

[3] Washington, Remington & Ballinger's Code (1910), sec. 7032.

ing for its object or effect the controlling of the price of any products of the soil or of any article of manufacture or commerce or the cost of exchange or transportation.

The constitution of Wyoming (Art. X, sec. 8) prohibits the consolidation or combination of corporations to control or influence production or prices.

The constitution of New Hampshire (art. 82) grants to the general court the power to enact laws "to prevent the operations within the State of all persons and associations, and all trusts and corporations, foreign or domestic, and the officers thereof, who endeavor to raise the price of any article of commerce."

STATUTORY PROVISIONS.—New Jersey prohibits combinations or agreements between corporations, firms, or persons—

(1) To increase the price of merchandise or of any commodity.[1]

(2) To fix at any standard or figure, whereby its price to the public or consumer shall in any manner be controlled, any article[1] or commodity of merchandise, produce, or commerce intended for sale, use, or consumption in this State or elsewhere.

(3) To make any agreement by which they directly or indirectly preclude a free and unrestricted competition among themselves, or any purchaser or consumers, in the sale or transportation of any article or commodity, either by pooling, withholding from the market, or selling at a fixed price, or in any other manner by which the price might be affected.

(4) To make any secret oral agreement or arrive at any understanding, without express agreement, by which they directly or indirectly preclude a free and unrestricted competition among themselves or any purchaser or consumer, in the sale or transportation of any article, either by pooling, withholding from the market, or selling at a fixed price, or in any manner by which the price might be affected.[2]

Kansas prohibits, in substance, combinations of capital, skill, or acts by two or more persons, corporations, etc.—

(1) To increase or reduce the price of merchandise, produce, or commodities, or to control the cost or rates of insurance.

(2) To fix any standard or figure, whereby its price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce, or commerce intended for sale, use, or consumption in this State.

(3) To make any contract, agreement, etc., by which they shall bind themselves (*a*) not to sell, manufacture, or transport any such article, etc., below a common standard figure, or (*b*) to keep the price

[1] The words "article" and "commodity" in this act are to be construed as synonymous with natural products, manufactured products, and goods, wares, and merchandise.

[2] New Jersey, Laws 1913, chap. 13.

of any such article, commodity, or transportation at a fixed or graded figure, or (*c*) to establish the price of any such article, transportation, etc., between them or themselves and others, so as to preclude free and unrestricted competition among themselves or others.

(4) To pool, combine, or unite any interests they may have in connection with the manufacture, sale, or transportation of any such article or commodity, that its price may in any manner be affected.[1]

Louisiana, Michigan, Ohio, Nebraska, North Dakota, and California have statutes substantially similar to the Kansas law.[2] None of these, however, cover insurance. The other principal differences are: Louisiana, Michigan, Ohio, Nebraska, North Dakota, and California omit the word "manufacture" after "sell" in clause (*a*), paragraph (3); use "graduated" instead of "graded" in clause (*b*), paragraph (3). Louisiana omits "commodity or transportation" in clause (*b*), paragraph (3). These six States also omit "manufacture" before "sale" in paragraph (4). Nebraska adds "production" after "sale" in paragraph (4). In the Michigan, Ohio, Louisiana, Nebraska, North Dakota, and California acts the word "at" follows "fix" in paragraph (2), making it read "to fix at any standard," etc. Michigan, Ohio, Nebraska, California, and North Dakota do not have "produce" after "merchandise" in paragraph (1). Nebraska inserts "card or list price" after "standard figure" in clause (*a*), paragraph (3), and North Dakota "or card price list" in the same clause. Michigan and Ohio insert "or fixed value" after "standard figure" in this clause. In the Michigan and Ohio statutes, "directly or indirectly" is inserted immediately before "unite" in paragraph (4). Louisiana omits "sale, use" before "consumption" in paragraph (2). Nebraska has "upon" after "controlled or established" in paragraph (2). North Dakota inserts "property" before "merchandise" in paragraph (1); and "manufacture" takes the place of "commerce" in paragraph (2). California omits "or reduce" in paragraph (1), and in California, Michigan, and Ohio the words "or consumer" follow "the public" in paragraph (2). In the Nebraska law the words "dispose of, traffic in" follow "sell" in clause (*a*), paragraph (3), and the phrase "with the intent to preclude, or the tendency of which is

[1] Kansas, Laws 1897, chap. 265, sec. 1; G. S., sec. 5142.

State v. *Phipps et al., 50 Kans., 609 (1893).*—Alleged that defendants were agents of foreign insurance companies doing business in the State, that the companies had combined to control the price and rate of insurance in Oswego, Kans., that they increased such rates, and that accused were compelling local agents to observe rates so established. Urged that the law of 1889 so far as it affected foreign insurance companies or their agents was in conflict with the power of Congress to regulate interstate commerce, the court having recently held that insurance was "trade." Held, that "trade," so used, was not synonymous with interstate commerce, that insurance was not interstate commerce, and that the State has power to regulate the business of foreign insurance companies. Conviction affirmed under the antitrust law of 1889. (Somewhat similar but less comprehensive than the statute of 1897 above cited.)

[2] Louisiana, Laws 1892, act 90, sec. 1; Michigan, P. A. 1899, No. 255, sec. 1; Ohio, G. C., sec. 6391; Nebraska, R. S. (1913), sec. 4017; North Dakota, Laws 1907, chap. 259, sec. 1; California, Laws 1907, chap. 530, sec. 1, as amended by Laws 1909, chap. 362.

to prevent or preclude," is used instead of "so as to preclude" in clause (*c*), paragraph (3). Michigan adopts the word "arts" instead of "acts" in the opening clause.

The law of Texas is substantially similar to that of Kansas, the principal difference being that in addition the former prohibits (*a*) the fixing or maintenance of prices, etc., as well as increasing or reducing prices, and (*b*) affecting, by any of the means set forth in the law, the price of preparing any product for market or transportation.[1]

Arizona has a law similar to the Kansas statute, as has also Colorado, except that the latter does not apply to insurance.[2]

While, as already pointed out, certain provisions of the California law are very similar to those of the Kansas statute, the former act provides also that no agreement, combination, etc., shall be deemed to be unlawful or within the provisions of the act whose object is to conduct its operations at a reasonable profit or to market at a reasonable profit those products which can not otherwise be so marketed; nor shall it be deemed unlawful for persons or corporations engaged in the business of selling or manufacturing commodities of a like character to employ, organize, or own any interest in any

[1] G. L. 1903, Chap. XCIV, sec. 1.

Queen Insurance Co. v. *State*, *83 Tex.*, *250* (*1892*).—Action under act of 1889 (somewhat similar to act cited) against Texas Insurance Club, an association of insurance agents, and 57 foreign insurance corporations. Alleged that the club was organized, with the consent and procurement of defendant companies, for the purpose of fixing rates and commissions. Held, that the act did not apply, as insurance was neither "trade" nor a "commodity" within the meaning of the act.

Wiggins v. *Bisso*, *92 Tex.*, *219* (*1898*).—In a suit by a partner for an accounting, defendant pleaded that the profits, if any, were accumulated under an unlawful agreement with the St. Louis Brewing Association whereby said partnership and brewing association combined their skill, capital, labor, and acts to create and carry out restrictions in trade, to increase the price of beer, and to prevent competition in transportation, sale, and purchase of beer, etc., and set up a contract providing for the sale of beer to the dealer at stipulated prices, the manufacturer obligating himself not to sell beer to any other person in the town and the dealer obligating himself not to buy from any other except said manufacturer. On demurrer, held a good defense.

Waters-Pierce Oil Co. v. *Texas*, *10 Texas Civil Appeals*, *1* (*1898*), *177 U. S.*, *28* (*1900*).—The Waters-Pierce Oil Co., a foreign corporation doing business in Texas, was alleged to have made contracts with dealers in oil, through its agents in the State, which bound the dealers to buy only of the Waters-Pierce Co., to sell at a price fixed by the company, not to sell to competing dealers, and to pay certain penalties to the company if they bought from a competitor. The court of civil appeals sustained a decree forfeiting the right of the company to do business in the State, holding that the statutes involved were a valid exercise of the police power of the State. On writ of error to the Supreme Court of the United States the judgment was affirmed, the court holding that the courts of Texas had the right to interpret their statutes to apply to intrastate commerce only; that the statute of March 30, 1889, imposed conditions which it was within the power of the State to impose, and that this statute was not repealed by the act of April 30, 1895.

Waters-Pierce Oil Co. v. *State*, *106 S. W.*, *918* (*Tex. 1907*); *212 U. S.*, *86* (*1909*).—Alleged that the Waters-Pierce Oil Co. was a party to an agreement or understanding with the Standard Oil Co. of New Jersey, one object of which was to create a monopoly and control the price of petroleum oil and prevent competition in its sale in a large territory, including Texas, and to a large extent such object was accomplished. Held, that the performance of such agreement within the State constituted a violation of the antitrust laws of 1899 and 1903, although the agreement may not have been made therein. Penalty assessed and permit to do business in State, except as to interstate commerce, ordered canceled. Affirmed by Supreme Court of United States, which held that laws prohibiting acts which "tend" or are "reasonably calculated" to restrain trade and prevent competition are not so vague and indefinite as to deprive any one of due process of law; and declined to hold a fine of over $1,600,000 so excessive as to amount to deprivation of property without due process of law where it appeared that the business was extensive and profitable during the period of violation, and that the corporation had over $40,000,000 of assets, and had declared dividends amounting to several hundred per cent.

[2] Arizona, Laws 1912, chap. 73, sec. 1; Colorado, Laws 1913, chap. 161, sec. 1.

association, etc., having as its object the transportation, marketing, or delivery of such commodities.[1] Colorado also has a similar provision.[2]

A section of the Ohio law imposes a much heavier penalty in case of combinations to control the price or supply, or to prevent competition in the sale of bread, butter, eggs, flour, meat, or vegetables.[3]

Arkansas prohibits any person, corporation, firm, etc., from entering into any pool, agreement, etc., whether the same is made in the State or elsewhere, to regulate or fix either in the State or elsewhere the price of any article of manufacture, commodity, or any article or thing whatsoever, or the price or premium to be paid for insuring property, or to maintain said price when so fixed.[4]

Mississippi has a statute similar to that of Arkansas, except that the provision against fixing prices is limited to the State instead of "in this State or elsewhere." [5]

South Carolina and Tennessee prohibit arrangements, contracts, trusts, etc., designed or which tend to advance, reduce, or control the price or the cost to the producer or consumer of articles imported into the State, or in the manufacture or sale of articles of domestic growth or domestic raw material.[6] Kansas has a similar

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[1] California, Laws 1907, chap. 530, sec. 1, as amended by Laws 1909, chap. 362.

Grogan v. *Chaffee, 156 Cal., 611 (1909).*—A manufacturer of olive oil, in a quantity relatively small in comparison with the amount manufactured and sold in the market supplied by him, sought an injunction, alleging that the defendant bought oil under an express agreement that he would not sell it at less than a given price and that he had sold and threatened to sell it at less than such price. Held, that there was nothing unreasonable or unlawful in the effort of a manufacturer to maintain a standard price for his goods; that it was simply a means of securing the legitimate benefits of the reputation which his product may have attained; that the condition was valid as between the original seller and buyer; that, as between them, its breach may be enjoined by the manufacturer, and that section 1673, Civil Code, declaring void contracts restraining the exercise of a lawful business, did not apply. (Antitrust Law referred to but not involved in decision.)

D. Ghirardelli Co. v. *Hunsicker et al., 164 Cal., 555 (1912).*—This case is similar to Grogan *v.* Chaffee except that defendants did not purchase from plaintiff, but from a jobber who purchased from plaintiff upon the same general conditions on which Chaffee bought from Grogan. Held, that such a condition was enforceable, not only against the jobber, but also against a purchaser who bought to sell again at retail under an agreement with the jobber, which in terms was made for the express benefit of the manufacturer, whereby he undertook to maintain the fixed retail price; that the contract of the second purchaser was one of the class referred to in section 1559, Civil Code, providing that a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it; and, further, that the agreement was not in violation of the State Antitrust Act as amended in 1909, nor unenforceable as being in restraint of trade under the common law.

[2] Colorado, Laws 1913, chap. 161, sec. 1.

[3] Ohio, G. C., sec. 6396, as amended by the act of May 3, 1913.

[4] Arkansas, Act 1, 1905, as amended Laws 1913, Act 161.

State v. *Frank et al., 169 S. W., 333 (Ark., 1914).*—Defendants, proprietors of laundries in Little Rock, were alleged to have agreed with each other to fix prices to be charged their customers and to have conducted business under this agreement. It was further alleged that for the purpose of driving out competition in the city of Malvern they entered into a combination to do the laundering of that place at a less price than was charged at Little Rock and other places. The complaint alleged a violation of the antitrust statute (acts 1905, p. 1, sec. 1). The State supreme court in sustaining a demurrer to the complaint held that the subject matter of the agreement was not a "commodity," "convenience," or "repair," nor was it within the phrase "any article or thing whatsoever," as used in the statute; that the business of laundering was a mere service done, and an agreement to regulate the price to be charged therefor was, in its last analysis, merely an agreement to fix the price of labor, or services, which had not been made unlawful.

[5] Mississippi, Code 1906, sec. 5002, as amended by Laws 1908, chap. 119, sec. 1.

[6] South Carolina, Civil Code, sec. 2437; Tennessee, Laws 1903, chap. 140, sec. 1.

statute, differing principally in that it extends to agreements affecting attorneys' or doctors' fees, the rate of insurance, and the rate of interest on loans, or any other services.[1]

South Carolina also has a statute prohibiting pools, agreements, etc., to regulate or fix the price of any article or thing whatsoever, or to maintain said price when so regulated or fixed, or to fix or limit the price of property insurance.[2]

Idaho prohibits corporations, associations of persons, etc., directly or indirectly to combine or contract in any manner whatsoever to fix the price of any article of commerce, or of produce of the soil, or of consumption by the people.[3] Illinois, Utah, and Iowa have similar provisions in their laws, except that they also prohibit combinations, etc., of "individuals," and prohibit combinations "to regulate or fix the price of any article of merchandise or commodity."[4] The Utah laws also prohibit any combination by persons having for its object or effect the control of prices for professional services, any products of the soil, any article of manufacture or commerce, or the cost of exchange or transportation.[5]

Wisconsin prohibits any agreement, contract, etc., to restrain or prevent competition in the price of any article or commodity in general use in the State or constituting a subject of trade or commerce, or which shall in any manner control or fix the price of any such article or fix any standard or figure by which the price to the public of any such article shall be in any manner controlled or established.[6]

Indiana prohibits every scheme, design, understanding, contract, etc., to increase or reduce the price of merchandise or any commodity, natural or artificial,[7] and all arrangements, etc., between

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[1] Kansas, Laws 1889, chap. 257, sec. 1; G. S., sec. 5185.

[2] South Carolina, Laws 1902, No. 574, sec. 1.

[3] Idaho, Laws 1909, p. 297.

[4] Illinois, Laws 1891, p. 206, as amended by Laws 1893 and 1907; Utah, Stats., sec. 1753; Iowa, Stats., sec. 5060.

Ford et al. v. *Chicago Milk Shippers' Association, 155 Ill., 166 (1895).*—The milk producers, shippers, and wholesale dealers in and around Chicago formed an association to regulate the sale and price of milk to the retail dealers. The boards of management of the association in pursuance of this purpose fixed the price to be paid for milk during certain periods, notified the members and city dealers, and required all parties buying milk from said association to give bonds to secure compliance with this and other orders. The association was given control of all milk consigned by any of its members to any stand in Chicago. In an action by the association against Ford et al. to recover for milk delivered, the defendants pleaded that the acts of the association were unlawful under laws of 1891, page 206, and on appeal to the State supreme court the plea was sustained.

[5] Utah, Stats., sec. 1752.

[6] Wisconsin, Laws 1907, p. 432; Stats., sec. 1791j.

Butterick Publishing Co., respondent, v. *Rose, appellant, 141 Wis., 533 (1910).*—Plaintiff entered into a contract with defendant in which the latter agreed to purchase a specified amount of plaintiff's patterns (patented), to sell them at retail prices fixed by plaintiff, and not to sell any other make of patterns during the continuance of the contract. Subsequently defendant refused to receive any more patterns and advertised and sold patterns of a rival concern. Defendant contended, among other things, that the contract was in restraint of trade and in violation of section 1770g, Wisconsin Statutes (similar to sec. 1791j, but applies to foreign corporations). Held, that this section was not intended to restrict the rights of a patentee, acquired under the laws of the United States, and that to hold that it did apply would make it unconstitutional.

[7] Indiana, Laws 1907, chap. 243, sec. 1.

persons or corporations who control the output of any article of merchandise, designed, or which tend to advance, reduce, or control the price or the cost to the producer or consumer.[1]

A Michigan statute prohibits all contracts and agreements the purpose or intent of which is (among other things) to enhance or control or regulate the price of any article of machinery, tools, implements, vehicles, or appliances, to be used in any branch of productive industry. A clause of the act saves contracts "known to the common law and in equity as those relating to good will of trade."[2]

Minnesota prohibits any pool, combination, or understanding whatsoever which tends in any way or degree to limit, fix, control, maintain, or regulate the price of any article of trade, manufacture, or use bought and sold in the State.[3]

Mississippi prohibits combinations, contracts, understandings, etc., expressed or implied, to limit, increase, or reduce the price of a commodity.[4]

Mississippi requires the charter or articles of association or the law under which a clearing-house association is organized to prohibit it and its officers and managers from attempting to make or enforce any rule, regulation, agreement, or understanding in respect to (*a*) the fees, commissions, or other compensation chargeable by or payable to or to be charged by or paid to any member by its customers or otherwise for the collection by or through such member or its agent or correspondent of checks, drafts, notes, or bills of exchange drawn upon banks, bankers, trust companies, or others that are not members of such associations or that are outside its boundaries; (*b*) the rates of discount or interest chargeable or to be charged by or to be paid to members on loans or discounts to or for customers or others; (*c*) the rates of interest to be allowed by members on deposits; and (*d*) the rates of exchange.[5]

Missouri prohibits pools, agreements, etc., to regulate, control, or fix the price of any article of manufacture, mechanism, commodity, etc., or anything whatever bought and sold, or the price to be paid for property insurance, or to maintain said price when so regulated or fixed.[6] Also all agreements or contracts, designed or made with a

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[1] Indiana, Stats., sec. 3878.

[2] Michigan, P. A. 1905, No. 220, sec. 1.

[3] Minnesota, Stats. (1913), sec. 3973.

[4] Mississippi, Code 1906, sec. 5002, as amended by Laws 1908, chap. 119, sec. 1.

Barataria Canning Co. v. *Joulian, 80 Miss., 555 (1902).*—The defendant contracted to sell to plaintiff, a competing manufacturer, all the cove oysters which he should pack during certain months except three carloads per month, and further agreed that these three carloads should not be sold at a lower price than that offered to the trade by the plaintiff. The contract was held void as an agreement to limit the price of a commodity within the prohibition of sections 4437, 4438, Code, 1892 (substantially similar to act cited).

[5] Mississippi, Laws 1914, chap. 124, sec. 65.

[6] Missouri, Rev. Stats., chap. 98, sec. 10299, as amended in 1913.

view to increase, or which tend to increase, the market price of any product, commodity, or thing, or the price of property insurance.[1]

Montana prohibits any person, corporation, etc., directly or indirectly, from combining or forming any trust, or making any contract, for the purpose of fixing the price of any article of commerce, or product of the soil, for consumption by the people. The statute provides that "article of commerce" shall include gas, water, water power, electric light, and electric power.[2] It is also unlawful for warehousemen to enter into any contract, agreement, combination or understanding with any other warehousemen at any railway station, whereby the price to be paid for any kind of grain at such station shall be fixed or in any manner affected.[3]

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[1] Missouri, R. S., chap. 98, sec. 10301, as amended in 1913.

State v. *Firemen's Fund Ins. Co. et al., 53 S. W., 595 (Supreme Court of Missouri, 1899).*—Foreign fire insurance companies doing business in St. Joseph subscribed for the rate books issued by one who had fixed rates for a former association. The agents of the companies formed a "social club," and employed as secretary a man who had formerly been employed by the one who issued the rate books. To prevent rebates all agents submitted their monthly statements to the secretary of the club. Each policy written by an agent was put in an unsealed envelope, addressed to his company, and turned over to the secretary of the club, who compared it with the rate book, and if the premium charged did not correspond therewith, the agent was called upon for an explanation. The members of the club agreed to abide by the rates fixed, and fines were provided for departures from these rates. Held, that the club was a pool or trust, under the act of 1897, section 1 (similar to act cited), and that said companies had forfeited their right to do business in the State.

State v. *Continental Tobacco Co., 177 Mo., 1 (1903).*—Proceeding to forfeit right to do business in the State. Among other things it was alleged that the Continental Tobacco Co. purchased the business of a competitor and closed the factory. Held, that the antitrust law of 1897 which prohibits any corporation, etc., from creating or entering into any pool, trust agreement, etc., with any other corporation, etc., to regulate or fix the price of any article of manufacture or to maintain such price when so fixed and regulated, was not broad enough to prohibit one corporation, in good faith, in the legitimate pursuit of its business, from purchasing the assets of another corporation in a similar business.

State v. *Armour Packing Co. et al., 173 Mo., 356 (1903).*—Quo warranto proceedings to oust certain packers from doing business in State. Wholesale meat dealers selling from 65 to 80 per cent of all dressed beef and from 50 to 60 per cent of all dressed pork in St. Joseph, St. Louis, and Kansas City formed a voluntary association which fixed and controlled prices and apportioned territory. Held, a violation of antitrust law and defendants fined, subject to ouster if fine was not paid.

State v. *Assurance Companies, 251 Mo., 278 (1913).*—Attorney general in an information in nature of quo warranto charged that certain foreign fire-insurance companies agreed to unitedly withdraw from the State on a certain day and to cease, by concerted movement, to write insurance in the State. On demurrer, held that respondents had no legal right, by agreement, to withdraw in a body or to cancel their policies in pursuance of agreement; that the information stated a good cause of action; and that the court had jurisdiction to issue a temporary injunction in aid of or ancillary to a pending quo warranto writ, restraining said companies from withdrawing from the State and otherwise doing irreparable injury and canceling existing policies.

State v. *Polar Wave Ice & Fuel Co., 169 S. W., 126 (Mo., 1914).*—The defendant corporation was organized to take over the business of seven companies engaged in furnishing ice in St. Louis. Three of the companies were wholesalers and the remainder retailers. The wholesalers controlled about 20 per cent of the wholesale trade of the city, and the retailers about 40 to 50 per cent of the retail trade. By a series of contracts and paper payments without the actual payment of any money, the stock of the seven companies was exchanged for stock of the defendant corporation. In quo warranto proceedings, it was alleged that the seven companies, before the forming of the defendant corporation, had a combination whereby they fixed and maintained the wholesale and retail prices of ice; and that the defendant corporation was formed to enable them more easily to fix and maintain the prices and control the ice trade in St. Louis. A referee recommended judgment for defendant, but on exceptions by the State the circuit court of St. Louis disapproved the findings and rendered a judgment ousting defendant of its charter rights, holding that its organization and incorporation was a violation of the Missouri antitrust statute (Rev. Stats., sec. 10301). On appeal the State supreme court affirmed the decision, but modified the judgment by making the ouster conditional.

[2] Montana, Laws 1909, chap. 97, sec. 1.

[3] Montana, Laws 1915, chap. 69, sec. 1.

New Mexico prohibits contracts or combinations having for their object or which shall operate to control the price of any article of manufacture or product of the soil or mine.[1]

New York prohibits contracts, agreements, etc., whereby competition in the State in the price of any article or commodity of common use is or may be restrained or prevented;[2] and conspiracies to commit any act injurious to trade or commerce.[3] Recent statutes

[1] New Mexico, C. L. 1897, sec. 1292.

[2] New York, Gen. Business Law, sec. 340.

Straus v. *American Publishers' Association, 177 N. Y., 473 (1903); 193 N. Y., 496; 199 N. Y., 548; 231 U. S., 222 (1913).*—The American Publishers' Association was composed of about 75 per cent of the publishers of copyrighted and uncopyrighted books in the United States, and the American Booksellers' Association included a majority of the booksellers throughout the United States. The associations adopted resolutions and made agreements obligating members to sell copyrighted books only to those maintaining retail prices on such books. Plaintiff in error, having cut prices, was boycotted by members of the association, and brought suit, praying that the combination and agreements be declared unlawful and that defendants be enjoined from acting thereunder or accomplishing the purpose thereof, and for damages. The Court of Appeals of New York held that the agreement as to copyrighted books was not illegal because of the copyright laws of the United States, but that as to uncopyrighted books it was a violation of State antitrust law. The Supreme Court of the United States held that the court "erred in holding that the agreement was justified by the copyright act, and was not within the denunciation of the Sherman Act, and in denying, for that reason alone, the right of the plaintiffs in error to recover under the State act as to copyrighted books."

Paine Lumber Co., Ltd., et al. v. *Neal et al., 212 Fed., 259 (1913).*—Complainants, manufacturers of wood products, alleged that the defendants, composed of officers and agents of the United Brotherhood of Carpenters and Joiners of America, and of the Joint District Council of New York and vicinity of the United Brotherhood of Carpenters and Joiners of America, certain union manufacturers of wood products, and a number of master carpenters, entered into agreements which, among other things, provided that "There shall be no restrictions against the use of any manufactured material except non-union or prison-made," and that in pursuance of such agreements defendants had prevented the free sale and use of complainants' goods because they did not run so-called union shops. The court held the agreements to be in violation of the Sherman Antitrust Law and the New York State antitrust law (Gen. Business Law, sec. 340), and, in expressing an opinion in regard to whether article 54, section 580 of the New York Penal Law applied to these acts, stated that the gist of the offense is an agreement to prevent competition regardless of the motive of the parties; the prevention of competition in business being an "act injurious to trade" within the statute. However, relief by injunction was denied on the ground that such relief was not available to a private suitor to correct a general business situation in the case of employers or a general trade situation in the case of employees, and that there was ample remedy at law. (Affirmed by the Circuit Court of Appeals, 214 Fed., 82 [1914].)

[3] N. Y. Penal Law, Art. LIV, sec. 580.

People v. *Sheldon et al., 139 N. Y., 251, (1893).*—This case was decided under a section (now Penal Code, art. 54, secs. 580–6) prohibiting conspiracies to commit any act injurious to trade or commerce, etc. Coal dealers of Lockport organized the Lockport Coal Exchange, raised prices 75 cents per ton, and eliminated competition. Held, no error to instruct jury that if the purpose of the agreement was to prevent competition in the price of coal between retail dealers it was illegal and justified the conviction of the defendants. Held further, that these provisions required the State not only to show an agreement but an overt act—in this case the raising of the price of coal.

Cummings v. *Union Blue Stone Co. et al., 164 N. Y., 401 (1900).*—The Blue Stone Association was formed by 15 dealers to prevent competition. The association designated the Blue Stone Co., one of its members, to act as sales agent for all bluestone. Sales were apportioned among producers according to a schedule, and prices were increased. One of the parties sued the company for breach of the contract, which was held void as contrary to public policy. Held, further, that the scope of the contract, and not the possible self-restraint of the parties to it, is the test of its validity, and that in a civil action it need not be shown that the article was one of prime necessity.

People v. *Dwyer et al., 145 N. Y. Supp., 748 (1914).*—The New York Live Poultry Dealers' Protective Association, composed of the principal poultry receivers in the New York market and controlling about 90 per cent of the poultry shipped to that city, and an association of poultry jobbers, including nearly all of the large wholesale dealers, formed an agreement for pooling their profits. The agreement, among other things, provided that the members of the jobbers association should purchase all of the poultry sent to the receivers at prices to be agreed upon each week. Independent receivers who failed to observe prices fixed by the association were embarrassed by having the members of the association purchase all poultry intended to be shipped them; and independent dealers who did not maintain association prices were either bought out or competing markets were established near by and price cutting resorted to for the purpose of embarrassing them. Nineteen of the parties were indicted for conspiracy under sec. 580 of the New York Penal Law (Consolidated Laws, chap. 40), and of these 13 were found guilty and sentenced to three months' imprisonment and a fine of $500 each imposed. On appeal to the appellate division of the Supreme Court the conviction was affirmed (160 N. Y. App. Div., 542). Later it was also affirmed by the Court of Appeals, 215 N. Y., 48.

also provide that it shall be a misdemeanor for any buyer of milk for shipment,[1] or commission merchant dealing in farm produce,[2] to enter into any combination to fix prices; and provide further that for such cause the commissioner of agriculture may decline to grant or may revoke a license to conduct such business.

South Dakota prohibits combinations of capital or skill (1) to increase or reduce the price of commodities; (2) to fix any standard or figure whereby the price to the public shall be in any manner established or controlled.

The statute also makes it unlawful (1) for any person or persons, corporation, etc., to fix the price of any produce or commodity so as to obstruct or delay or prevent competition in such production or transportation, or in the purchase or sale of any product or commodity; (2) for any person, corporation, etc., in another State to directly or otherwise combine, agree, etc., with any person, corporation, etc., in the State, or for any person, corporation, etc., in the State so to combine, agree, etc., with any other person, corporation, etc., within or without the State, or for any two persons, corporations, etc., organized or existing without the State and doing business within the State, so to combine, agree, etc., to fix prices of any product or commodity so as to obstruct or prevent competition in the purchase or sale of any product or commodity.[3]

Kansas and Nebraska prohibit agreements, contracts, etc., between grain dealers or between grain dealers and any other person, corporation, etc., to fix the price which any grain dealer or dealers, or any other person, shall pay for grain, hogs, cattle, or stock.[4]

Nebraska prohibits also agreements, contracts, etc., between lumber or coal dealers or between such dealers and any other person, corporation, etc., to fix the price or minimum price at which any lumber or coal dealer, or dealers, or any other person, shall sell lumber or coal.[5]

Another section of the Nebraska statutes prohibits any combination or agreement between fire insurance companies transacting business in the State, or their officers or employees, relating to rates, agents' commissions, or the manner of transacting business.[6]

California prohibits the issuance or ownership of trust certificates, or entering into any contract, combination, etc., the purpose and effect of which shall be to place the management or control of such combinations or the manufactured product thereof in the hands of

[1] N. Y. Laws 1913, chap. 408, secs. 57, 61.
[2] Idem, chap. 457, secs. 286, 289.
[3] South Dakota, Laws 1909, chap. 224, secs. 1-5.
[4] Kansas, Laws 1887, chap. 175, sec. 1; G. S., sec. 5182; Nebraska, R. S. (1913), sec. 8858.
[5] Nebraska, R. S. (1913), sec. 4026.
[6] Idem, sec. 4022.

any trustee, with the intent to limit or fix the price of any article of commerce, use, or consumption.[1]

Michigan and Ohio have laws similar to this California statute.[2]

The law of Oklahoma varies from that of California principally in the use of the disjunctive "or" between "purpose" and "effect" and, after the word "combinations," of the words "or the conduct or the operation of the same, or the output of manufactured product thereof, or the marketing of the same in the hands of any trust or trustees, holding corporation or association, firm, or committee, with the intent" etc.[3]

Illinois, Iowa, Kansas, Missouri, and Utah have statutes similar to the California act, the principal difference being that the prohibition against the issuance or ownership of trust certificates is limited to "corporations," and one of the parties to the prohibited combinations, contracts, etc., must be a corporation, or its officers, directors, stockholders, etc.[4]

A California statute provides that no person, corporation, etc., appropriating water for power purposes shall enter into any agreement, combination, or trust in restraint of trade contrary to law, and if any works owned or operated by any licensee under this act shall be controlled in any manner whatsoever so that it or they form a part of or in any way effect any combination, or if it or they are in any wise controlled by any combination or conspiracy to increase or prevent the lowering of the price at which electricity or electrical or other power is to be sold, rented, or distributed, all rights to the appropriation of water shall be forfeited.[5]

In Washington, corporations not formed for profit are prohibited from entering into any agreement or combination to fix or establish or which shall attempt to fix or establish the price of any commodity.[6]

Washington also prohibits commission merchants from entering into any combination, conspiracy, or pool for the purpose of artificially raising or depressing the market price of any farm, dairy, orchard, or garden produce, or of excluding from the market the produce of any particular locality grown or manufactured by any person within the State.[7]

Alabama prohibits produce merchants from entering into any combination to fix prices.[8]

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[1] California, Laws 1907, chap. 530, sec. 10.

[2] Michigan, P. A. 1899, No. 255, sec. 10; Ohio, G. C., sec. 6392.

[3] Oklahoma, Laws 1908, chap. 83, sec. 10.

[4] Illinois, Laws 1891, p. 206, as amended by laws of 1893 and 1907, sec. 2; Iowa, Code, sec. 5061; Kansas, Laws 1889, chap. 257, sec. 2; Missouri, R. S., chap. 98, sec. 10306, as amended in 1913; Utah, Stats., sec. 1754

[5] California, Laws 1911, chap. 406, sec. 28.

[6] Washington, Remington & Ballinger's Code (1910), sec. 3762.

[7] Idem, sec. 7032.

[8] Alabama, Laws 1915, p. 162.

Section 7. Limitation of output.

Agreements or combinations for the purpose of limiting output are prohibited by the constitutions of 6 States (Arizona, Idaho, Montana, South Dakota, Washington, and Wyoming) and the statutes of 28 (Alabama, Arizona, Arkansas, California, Connecticut, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Wisconsin).

CONSTITUTIONAL PROHIBITIONS.—The constitutions of Idaho and Montana, in substance, prohibit persons, corporations, etc., from forming a trust, or making any contract for the purpose of regulating the production of any article of commerce, or of the produce of the soil, or of consumption by the people.[1] In Montana the words "of the product of the soil, for consumption by the people," are used.

In substance, the constitutions of South Dakota and Washington prohibit corporations, associations, etc., from combining or making any contract with any other corporation or association to limit the production of any product or commodity so as to prevent competition in such production.[2]

The constitution of Arizona (Art. XIV, sec. 15) prohibits corporations, copartnerships, or associations of persons in the State from combining or making any contract with any incorporated company, copartnership, etc., or in any manner whatever to limit the production of any product or commodity.

The constitution of Wyoming (Art. X, sec. 8) prohibits the consolidation or combination of corporations to control or influence productions or prices thereof.

STATUTORY PROHIBITIONS.—The laws of California and 9 other States (Alabama, Illinois, Iowa, Kansas, Michigan, Missouri, Ohio, Oklahoma, and Utah), broadly speaking, prohibit the issuance or ownership of trust certificates, and combinations, contracts, or agreements the purpose and/or effect of which shall be to place the management or control of such combination or the manufactured product thereof in the hands of any trustee with the intent to lessen the production and/or sale of any article of commerce, use, or consumption, or to prevent, restrict, or diminish the manufacture or output of any such article.[3]

The law of Alabama does not apply to trust certificates, and other variations from the above form appear in the laws of other States,

[1] Idaho, Constitution, Art. XI, sec. 18; Montana, Constitution, Art. XV, sec. 20.

[2] South Dakota, Constitution, Art. XVII, sec. 20; Washington, Constitution, Art. XII, sec. 22.

[3] California, Laws 1907, chap 530, sec. 10; Alabama, Stats., sec. 7580; Illinois, act of June 11, 1891, as amended to 1907, sec. 2; Iowa, Code, sec. 5061; Kansas, Laws 1889, chap. 257, sec. 2; Michigan, P. A. 1899, No. 255, sec. 10; Missouri, R. S., chap. 98, sec. 10306, as amended in 1913; Ohio, G. C., sec. 6392; Oklahoma, act of June 10, 1908, sec. 10; Utah, Stats., sec. 1754.

especially Oklahoma. There is, however, considerable similarity in form and substance.

The laws of Arkansas and other States (Alabama, Illinois, Iowa, Mississippi, Missouri, South Carolina, Utah, Wisconsin, and Louisiana), in substance, prohibit pools, agreements, combinations, etc., to fix or limit in the State or elsewhere the amount or quantity of any article of manufacture, mechanism, commodity, convenience, repair, any product of mining, or any article or thing whatsoever.[1]

In Alabama and Mississippi the words "or elsewhere" are omitted.

In Missouri and South Carolina the words "in the State or elsewhere" are omitted.

The laws of Illinois, Iowa, and Utah apply to "any article, commodity or merchandise to be manufactured, mined, produced or sold" in the State.

The laws of Wisconsin apply to "any article or commodity in general use in this State or constituting a subject of trade or commerce therein" to be manufactured, mined, produced, or sold in the State.

A statute of Louisiana prohibits every contract, combination in the form of trust, or conspiracy in restraint of trade or commerce or to fix or limit the amount or quantity of any article, commodity, or merchandise to be manufactured, mined, produced, or sold in the State.[2]

Although the form of the statutes varies, other States [3] (Arizona, Louisiana, Michigan, Mississippi, New Jersey, North Dakota, Ohio, Nebraska, California, South Dakota, Indiana, and Texas) prohibit combinations to limit output.

The following extracts show that there is a slight difference in the scope of these acts:

Prohibit combinations to limit the production of commodities (South Dakota).

To limit, *increase* or *reduce* the production or output of a commodity (Mississippi).

To limit or reduce the production of *merchandise* or any commodity (Michigan, New Jersey, Ohio, California, and Nebraska).

To limit or reduce the production of *property*, merchandise, or commodities (North Dakota).

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[1] Arkansas, act of 1905, as amended Mar. 12, 1913, sec. 1; Alabama, Code 1907, sec. 7579; Illinois, act of June 11, 1891, as amended to 1907, sec. 1; Iowa, Code, sec. 5060; Mississippi, Code 1906, sec. 5002, as amended by Laws 1908, chap. 119, sec. 1; Missouri, R. S., chap. 98, sec. 10299, as amended in 1913; South Carolina, Laws 1902, No. 574, sec. 1; Utah, Stats., sec. 1753; Wisconsin, Stats. (1913), sec. 1791j; Louisiana, Acts 1890, No. 86.

[2] Louisiana, Acts 1890, No. 86.

[3] Arizona, Laws 1912, chap. 73, sec. 1; Louisiana, Acts 1892, No. 90; Michigan, P. A. 1899, No. 255, sec. 1; Mississippi, Code 1906, sec. 5002, as amended by Laws 1908, chap. 119, sec. 1; New Jersey, Laws 1913, chap. 13, sec. 1; North Dakota, Laws 1907, chap. 259, sec. 2; Ohio, G. C., sec. 6391; Nebraska, Stats., sec. 6281; California, Laws 1907, chap. 530, sec. 1; South Dakota, Laws, 1909, chap. 224, sec. 1; Indiana, R. S. 1908, sec. 3866; Texas, Laws, 1903, Chap. XCIV, sec. 1.

To limit or reduce the production of merchandise, *produce*, or commodities (Louisiana).

To limit the production of merchandise, *products*, or commodities (Arizona).

To limit or reduce the production of merchandise or any commodity, *natural* or *artificial* (Indiana).

To regulate, fix, or limit the output of any article or commodity which may be manufactured, mined, produced, or sold, or the amount of insurance which may be undertaken, or the amount of work that may be done in the preparation of any product for market or transportation (Texas).

Idaho prohibits corporations, associations, etc., from combining or contracting with any corporation for the purpose of regulating the production of any article of commerce or of produce of the soil or of consumption by the people.[1]

Montana in a substantially similar act includes "persons," and includes in the phrase "articles of commerce" gas, water, water power, electric light, and electric power, for whatever purpose used or employed.[2]

Minnesota prohibits combinations, understandings, etc., which limit or tend to limit the production of any article of trade, manufacture, or use, bought and sold within the State.[3]

New Mexico prohibits every contract or combination having for its object or which shall operate to control the quantity of any article of manufacture or product of the soil or mine.[4]

New York prohibits every contract, arrangement, combination, etc., whereby competition in the State in the supply of any article or commodity of common use is or may be restrained or prevented.[5]

Connecticut prohibits conspiracies, combinations, or agreements for the purpose of limiting or restraining the production, manufacture, shipment, or sale of ice, coal, or any other necessity of life, for the purpose of increasing the price thereof.[6]

California prohibits the destruction of "animal, vegetable or other stuffs, products or articles, in restraint of trade which are customary food for human beings and are in fit sanitary condition to be used as such."[7]

Another California statute provides that no person, corporation, etc., appropriating water for power purposes shall enter into any agreement, combination, or trust in restraint of trade contrary to law, and if any works owned or operated by any licensee under this act shall be controlled in any manner whatsoever so that it or they form a part of or in any way effect any combination, or if it or they are in

[1] Idaho, Laws 1909, act of Mar. 11, 1909, sec. 1.
[2] Montana, Laws 1909, chap. 97, sec. 1.
[3] Minnesota, Stats. (1913), sec. 8973.
[4] New Mexico, C. L. 1897, sec. 1292.
[5] New York, Cons. Laws, chap. 20, sec. 340.
[6] Connecticut, P. A. 1911, chap. 185.
[7] California, Laws 1913, chap. 233, sec. 1.

any wise controlled by any combination or conspiracy to limit the output of electricity or electrical or other power, all rights to the appropriation of water shall be forfeited.[1]

Wisconsin, by a very similar provision, prohibits combinations, contracts, and conspiracies to limit the output of hydraulic or hydro-electric power and provides that the State may take possession of the improvement as in cases of receivership and that the members of the Railroad Commission shall act as receivers during such period as the court may determine.[2]

In Washington, corporations not formed for profit are prohibited from entering into any agreement or combination to limit or regulate, or to attempt to limit or regulate, the production or distribution of any commodity.[3]

Section 8. Division of territory.

North Carolina prohibits any person, corporation, etc., engaged in buying or selling anything of value in the State from having any agreement or understanding, express or implied, not to buy or sell within certain territorial limits within the State, with intention of preventing competition in selling, or to fix the price or prevent competition in buying said things within these limits. The act does not prohibit an agent from representing more than one principal, but does not authorize two or more principals to employ a common agent for the purpose of suppressing competition or lowering prices. It is provided further that nothing herein shall prevent a person, firm, or corporation from selling his or its business and good will to a competitor and agreeing not to compete with the purchaser in a limited territory, as is now allowed under the common law, provided that such agreement shall not violate the principles of the common law against trusts and shall not violate the provisions of this act.[4]

Nebraska and Oklahoma prohibit any bridge contractor or bridge builder, or any other person, corporation, etc., from entering an agreement, combination, etc., for the allotment of any territory which any bridge contractor, person or persons, or corporation or association shall have for his or its exclusive territory.[5]

Texas prohibits combinations of capital, skill, or acts to abstain from engaging in or continuing business or from the purchase or sale of merchandise, produce, or commodities partially or entirely within the State or any portion thereof.[6]

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[1] California, Laws 1911, chap. 406, sec. 28.
[2] Wisconsin, Stats. 1913, secs. 1596-1672.
[3] Washington, Remington & Ballinger's Code (1910), sec. 3762.
[4] North Carolina, Laws 1913, chap. 41, sec. 5 (f).
[5] Nebraska, R. S. (1913), sec. 4037; Oklahoma, Comp. Laws 1909, sec. 8820.
[6] Texas, Laws 1903, Chap. XCIV, sec. 1 (7).

Section 9. Restraints on resales.

Nebraska prohibits combinations of capital, skill, or acts to establish any pretended agency for making the sale of any article of merchandise, produce, commodity, or manufacture appear to be for the original vendor for the purpose of enabling such vendor to control the wholesale or retail price after the title shall have passed from him.[1] Another section of the Nebraska laws prohibits the sale of any article upon condition that it shall not be sold again by the purchaser or restraining such sale by the purchaser.[2]

New Jersey prohibits "any merchant, firm or corporation, for the purpose of attracting trade for other goods, to appropriate for his or their own ends a name, brand, trade-mark, reputation, or good will of any maker in whose product said merchant, firm or corporation deals, or to discriminate against the same, by depreciating the value of such products in the public mind, or by misrepresentation as to value or quality, or by price inducement, or by unfair discrimination between buyers, or in any other manner whatsoever, except in cases where said goods do not carry any notice prohibiting such practice and excepting in case of a receiver's sale, or a sale by a concern going out of business." Violation of this provision may be enjoined and renders the party liable to threefold damages.[3]

North Dakota prohibits any combination of capital, skill, or acts for the purpose of establishing any pretended agency to cover the sale of any property, article, or commodity of merchandise, produce, or manufacture intended for sale, use, or consumption in the State, or to make such sale appear to be for the original vendor.[4]

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[1] Nebraska, R. S. (1913), sec. 4017.

[2] Idem, sec. 4050.

[3] New Jersey, Laws 1913, chap. 210.

Ingersoll et al. v. *Goldstein, 93 Atl. 193 (N. J. Ch., 1915).*—Complainants, manufacturers of Ingersoll watches, brought a bill framed under chapter 210, Laws 1913, to restrain defendants from advertising for sale or from selling complainants' watches at a less price than that advertised by the latter as the price to the consumer. Ingersoll Dollar Watches carried notices reading as follows: "Mechanism in this watch is covered by United States patents and the watch is licensed and sold under and subject to the following conditions assented to by purchase and controlling all sales and uses thereof, any violation of which license conditions revokes and terminates all rights and licenses as to this and all other watches of makers in violator's possession and subjects the violator to suit for infringement of said letters patent: (1) Jobbers may sell only to retail dealers, may not sell to any one designated by makers as objectionable, may not detach or sell without this notice and may sell only at rates specified in schedules furnished by makers. (2) Retailers may advertise and sell only to buyers for use at one dollar. (3) No donation, discount, rebate, premium or bonus may be allowed or given in connection with any sale at wholesale or retail. (4) It will not be offered as a premium or bonus for or in connection with the sale of other goods; or included in any combined sale. (5) Guarantee with date of sale indorsed thereon to accompany each watch." The bill was dismissed, the court holding that at common law, where the vendor sells his whole interest or property in chattels, with conditions restricting the sale thereof, the title passes, but the conditions, being against public policy, are void; that the statute under consideration, being in derogation of the common law, must be strictly construed; that the watches did not "carry any notice prohibiting" the practice condemned by the statute, but on the contrary the notice was too broad and forbade under certain penalties the sale under all conditions at a price less than that fixed.

While this report was in press this law was amended by the omission of the words "for the purpose of attracting trade for other goods," and the addition of the following sentence: "The notice prohibiting such practice shall contain a copy of this section and forbid the violation of any of its provisions." (New Jersey, Laws 1915, chap. 376, approved Apr. 21, 1915.)

[4] North Dakota, Laws 1907, chap. 259, sec. 2.

Section 10. Competitive methods.

EXCLUSIVE CONTRACTS.—Michigan prohibits agreements, understandings, etc., requiring that any particular make or brand of any article of machinery, tools, implements, vehicles, or appliances used in productive industry shall be dealt in by either party to the agreement to the exclusion of all other makes or brands of such articles; and also prohibits agreements, understandings, etc., providing for the exclusive sale of certain makes or brands of manufactured articles of machinery, tools, implements, vehicles, or appliances used in any branch of productive industry, and stipulating sums to be paid as liquidated damages to either party for every article so sold of other than the specified make or brand.[1]

North Carolina prohibits sales of goods, wares, or merchandise, etc., directly or indirectly upon the condition that the purchaser shall not deal in the goods, wares, etc., of a competitor of the vendor.[2]

Massachusetts prohibits any person, corporation, etc., doing business in the State from making it a condition of the sale of goods, wares, or merchandise that the purchaser shall not deal in the goods, etc., of any other person, corporation, etc.; but does not prohibit the appointment of sole agents for the sale of, nor the making of contracts for the exclusive sale of goods, wares, or merchandise.[3]

Massachusetts prohibits also any person, corporation, etc., from making it a condition of any sale or lease of any tool, implement, appliance, or machinery that the purchaser or lessee shall not buy, lease, or use machinery, tools, etc., or material or merchandise of any person, corporation, etc., other than such vendor, or lessor; but this provision does not impair the right, if any, of the vendor or lessor of any tool, machinery, etc., protected by a patent right vested in such vendor or lessor to require by virtue of such patent right the vendee or lessee to purchase or lease from such vendor or lessor such component and constituent parts of said tool, machinery, etc., as the vendee may thereafter require during the continuance of said patent right. This act does not prohibit the appointment of agents or sole agents to sell or lease machinery, tools, implements, or appliances.[4]

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[1] Michigan, P. A. 1905, No. 229, sec. 2.

[2] North Carolina, Laws 1913, chap. 41, sec. 5b.

[3] Massachusetts, R. L., chap. 56, sec. 1.

Commonwealth v. *Strauss, 191 Mass., 545 (1906).*—Defendant, agent of Continental Tobacco Co., sold tobacco under an agreement that if the purchaser should not deal in any other tobacco he would be allowed a rebate of 6 per cent. Prices paid by the purchaser were such that if he did not secure the rebate, his sales of this tobacco would not show a satisfactory profit. Held, that the contract was illegal, and that the exception in the statute allowing the appointment of exclusive sales agents did not include such an agreement nor was the rebate system here practiced within exception of statute. Held, further, that the law was not in contravention of articles 1 and 10 of the declaration of rights of the constitution of Massachusetts, nor Article I, section 8, of the Constitution of the United States, or the fourteenth amendment thereof, nor affected by the Federal Antitrust Law.

[4] Massachusetts, Laws 1907, chap. 469.

Kansas prohibits a person, firm, corporation, or association of persons doing business in the State from making it a condition of the sale of goods, wares, or merchandise that the purchaser shall not sell or deal in the goods, etc., of any other person, firm, etc. This law does not prohibit the appointment of agents or sole agents for the sale of, nor the making of contracts for the exclusive sale of, goods, etc.[1]

REFUSAL TO DEAL.—Missouri and South Carolina declare it unlawful for any two or more persons, corporations, etc., engaged in buying or selling any article or thing to enter into any pool, agreement, etc., to control or limit the trade in any article or thing, or to limit competition in such trade by refusing to buy from, or sell to, any other person, corporation, etc., for the reason that such other person is not a member of the pool, agreement, etc., or to boycott, or threaten to boycott, any person for buying from, or selling to, any other person who is not a member of the pool, agreement, etc.[2]

The Texas law is broader and prohibits (1) two or more persons, corporations, etc., engaged in buying or selling any article of merchandise, produce, or commodity from entering into an agreement or understanding to refuse to buy from or sell to any other person, corporation, etc.; (2) two or more persons, corporations, etc., agreeing to boycott or threaten to refuse to buy from or sell to any person, corporation, etc., for buying from or selling to any other person, corporation, etc.[3]

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[1] Kan. Gen. Stats., 1909, sec. 1649.

[2] Missouri, R. S., chap. 98, sec. 10300, as amended in 1913; South Carolina, Laws 1902, No. 574, sec. 5.

Walsh v. *Association of Master Plumbers, 97 Mo. App., 280 (1902).*—Plaintiff alleged an agreement between a plumbers' association and dealers and manufacturers, whereby the latter agreed not to sell supplies to others than members of the association, and the former to boycott any dealer selling to nonmembers, entered into for the purpose of fixing prices and limiting production of such articles; alleged further that he had refused to join association and for that reason defendants refused to sell him supplies or permit same to be sold to him. Held, that any remedy existing before the enactment of the antitrust law was not abridged by section 8979, Revised Statutes 1899 (substantially similar to act cited), making it the duty of the attorney general and prosecuting attorneys under his direction to institute proceedings to restrain such violations; that the agreement was unlawful, and that an injunction would lie to restrain the parties to such agreement from keeping its terms or demanding that they be kept, thus leaving the defendant corporations free to deal or not to deal with appellant as they might choose. Held, further, that the petition did not show the association to be illegal, that presumably it was formed for mutual protection and to fight competition, which it might lawfully do by lawful methods to the extent of driving nonmembers out of business; and that the facts alleged would not authorize the court to dissolve the association.

[3] Texas, Laws 1903, Chap. XCIV, sec. 3; Rev. Civ. Stats. (1911), Art. 7798.

State v. *Racine Sattley Co., 134 S. W., 400 (Texas, 1911).*—In an action to recover penalties it was alleged that defendant was a manufacturer of farming implements and buggies, and that it contracted with a dealer at Waco to give him the exclusive sale of its goods at such place, the latter agreeing not to buy or sell any other makes of like goods. On demurrer, held a violation of the antitrust act of 1903.

Star Mill & Elevator Co. v. *Fort Worth Grain & Elevator Co., 148 S. W., 604 (Texas, 1912).*—Fort Worth Grain & Elevator Co. made agreement with the Star Mill Co. not to buy grain from farmers, brokers, or others not regularly engaged in grain business in Panhandle of Texas. Held, that such agreement was direct violation of law (Act 1903, Chap. XCIV, secs. 3, 4) and therefore void and not enforceable.

Nickels v. *Prewitt Auto Co., 149 S. W., 1094 (Texas, 1912).*—Appellant Nickels contracted with the Prewitt Auto Co. for the exclusive agency for its machines in a specified territory for a fixed period. Appellant gave notes in payment for machines and when sued set up in defense that the contract violated the Texas Antitrust Law of 1903, above cited. Held, that the contract was not in violation of the antitrust law, as

The statutes of Indiana provide—

That any person, firm or association of persons who shall make any contract or enter into any agreement or make any combination or enter into any arrangement, directly or indirectly, to induce, procure or prevent any wholesale or retail dealer in or manufacturer of merchandise or of supplies or of material or article intended for trade or used by any mechanic, artisan or dealer in the prosecution of his business from selling such supplies to any dealer or to any mechanic or artisan; and that any dealer in or manufacturer of such supplies or material or article of trade or supplies or material to be used by any mechanic, artisan or dealer, who shall be a party, directly or indirectly, to any such contract, combination or arrangement, or who shall upon the request of any party to any such contract, combination or arrangement refuse to sell such articles of trade, supplies or materials, or articles sold by any dealer or used by any mechanic, or artisan, to any such person or persons who may require them in the prosecution of their said business, for the reason that said dealer, mechanic or artisan is not a member of a combination or association of persons, shall be guilty of conspiracy against trade.[1]

A Nebraska statute, in substance, prohibits persons, etc., dealing in, handling, or consigning grain, from forming, maintaining, or contributing to any pool, trust, combination, etc., for the prevention of competition among buyers, sellers, or dealers in grain, or which tends to prevent the fullest competition in the purchase, sale, or dealing in grain by persons, etc., not doing business through such pool, trust, combination, etc.; or for the prevention of competition by requiring members not to deal with nonmembers; or which requires its members to refuse to sell, purchase, or consign grain to any person, etc., who purchases or receives grain from nonmembers; or which has for one of its objects the prevention of any person, etc., not shipping grain through elevators, whether operated by members or not, from finding purchasers, by boycotting or threatening to boycott such purchasers.[2]

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it did not prohibit the company from making sales elsewhere, nor did it attempt to fix prices, nor prohibit appellant from purchasing or selling other articles of the same kind purchased elsewhere.

Wood v. *Texas Ice & Cold Storage Co., 171 S. W., 497 (Texas, 1914).*—Under a contract, an ice manufacturer and wholesaler agreed to sell a retail ice dealer at a fixed price, or the market price if it should fall below the price fixed, a certain quantity of ice or as much more as his trade required, provided the former was able to supply the extra ice. The retailer, in turn, agreed to purchase all his ice from this wholesaler if he could supply his demands. The retailer sued for breach of contract, claiming that the wholesaler refused to furnish ice at the contract price, and that he was compelled to go into the market and purchase ice at an increased price. On appeal, judgment for defendant was affirmed, the court holding that the contract was contrary to Rev. Stats., 1911, art. 7798, sub. 1; that the purpose of the statute is to make illegal such a contract without reference to the intent of the parties and without reference to its actual effect; and further that the fact that one of the parties was a wholesaler and the other a retailer does not take the contract out of a statute applying to parties engaged in the same character of business.

[1] Indiana, Stats., sec. 3884.

[2] Nebraska, Laws 1897, chap. 80, sec. 1.

State v. *Omaha Elevator Co. et al., 75 Nebr., 637 (1906).*—Defendants were members of the Nebraska Grain Dealers' Association, the main objects of which were to control the price of grain, destroy competition, and drive out "irregular" and independent dealers. The association sought to compel "irregular" dealers to become "regular," or to force them out of business by controlling the bidding in the purchase or sale of grain. Prices were fixed and the markets divided. Held, that such acts were illegal under the law of 1905.

LOCAL PRICE DISCRIMINATION.—Twenty-three States[1] (Arkansas, California, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Wisconsin, and Wyoming) have passed so-called "antidiscrimination" statutes which, broadly speaking, prohibit any person or corporation engaged in the production, manufacture, or distribution of a commodity from discriminating between different localities of the State by selling such commodity at a lower rate in one section than another, allowance being made for the difference in quality and in the cost of transportation. The statutes vary principally in the following particulars:

(*a*) The character of the article or commodity in the purchase or sale of which discrimination is prohibited; some dealing with a single class of commodities, such as petroleum products, and others with any commodity in general use.

(*b*) Intent; some statutes prohibiting the acts if done for the purpose of destroying competition, while under others a specific intent is not necessary to complete the offense.

(*c*) Allowances; in some States differences in cost of transportation are considered in determining whether discriminations exist, while in others differences in grade or quality may also be considered.

The trend of legislation is indicated below.

Discrimination in sales and purchases.—These statutes may be divided into two general classes—those prohibiting local price cutting and those prohibiting discriminations in the purchase of a commodity.

Each of the States above named except Oregon forbids sales at a lower price in one locality than in another. Oklahoma further prohibits sales "at the same rate or price at a point away from that of production or manufacture as at the place of production or manufacture, after making due allowance for the difference, if any, in the grade, quantity or quality, and in the actual cost of transportation from the point of production or manufacture, if the effect or intent thereof is to establish, or maintain a virtual monopoly hindering competition, or restriction of trade."

Thirteen of these States (Indiana, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, North Dakota, Oregon, South Dakota,

[1] Arkansas, Laws 1913, Act 51; California, Laws 1913, chap. 276; Indiana, Laws 1913, p. 304; Iowa, Laws 1913, chap. 310; Kansas, Gen. Stats., 1909, chap. 85, Laws 1915, chap. 368; Louisiana, Laws 1908, Act 128; Massachusetts, Laws 1912, chap. 651; Michigan, P. A. 1913, No. 135; Minnesota, Laws 1907, chap. 269, Laws 1913, chap. 230; Mississippi, Code 1906, sec. 5002, as amended by Laws 1908, chap. 119, sec. 1; Missouri, R. S., 98, as amended 1913, sec. 10314; Montana, Laws 1913, chaps. 7, 8; Nebraska, Acts 1913, chap. 117; New Jersey, Laws 1913, chap. 14; North Carolina, Laws 1913, chap. 41, sec. 5 (*c*); North Dakota, Laws 1907, chaps. 258, 260, Laws 1913, chap. 287; Oklahoma, Constitution, Art. IX, sec. 45, Act June 10, 1908, sec. 5, Laws 1913, chap. 114; Oregon, Laws 1915, chap. 344; South Carolina, Acts 1909, No. 7; South Dakota, Laws 1907, chap. 131, Laws 1913, chap. 356; Utah, Comp. Laws 1907, secs. 1762x–1762x7, Laws 1913, chaps. 12, 41; Wisconsin, Laws 1909, chap. 395, Laws 1913, chap. 165; Wyoming, Laws 1911, chap. 62, Laws 1915, chap. 23.

Utah, Wisconsin, and Wyoming) prohibit, under certain conditions, purchases at a higher rate in one locality than in another.

Class of articles or commodities.—Thirteen States (Kansas, Louisiana, Massachusetts, Montana, Nebraska, New Jersey, North Dakota, Oklahoma, South Carolina, South Dakota, Utah, Wisconsin, and Wyoming) prohibit discriminations in connection with the purchase (or sale) of "any commodity in general use."

The variations from the above are as follows:

Missouri, "any commodity or article of commerce in general use."

South Dakota, "any commodity in general use, or product." (South Dakota has two such statutes with slightly different terms.)

New Jersey and Oklahoma prohibit such discriminations in the sale of "any commodity of general use" or in "rendering any service to the public," and California, in the sale or furnishing of "any commodity of general use or consumption or the product or service of any public utility."

Mississippi prohibits such discriminations in the sale of "a commodity" or in "rendering any service or manipulating, handling or storing any commodity."

Iowa, "any commodity of commerce."

North Carolina, "any thing of value."

Arkansas, "news for publication."

Kansas, "news and news reports for newspaper use."

Utah, "information or news for publication."

Michigan, "petroleum products."

Minnesota, "petroleum or any of its products."

Indiana, "milk or milk products."

Minnesota, Oregon, and Wisconsin (1909), "milk, cream or butter fat."

North Dakota, "milk, cream, butter fat, grain or any commodity in general use." (Two statutes in North Dakota.)

Utah and Wyoming (1915), "milk, cream or butter fat" and "poultry or eggs."

Specific intent.—As indicated below, the statutes vary considerably in the provisions relating to intent.

"With the view of injuring the business of another." (North Carolina.)

"Who shall destroy or attempt to destroy competition." (Mississippi.)[1]

"Intentionally, for the purpose of destroying competition." (Kansas and Wyoming.)

[1] Although the statute provides that it shall be sufficient to make out a prima facie case to show a sale or offer for sale at a lower price, or a lower charge for services, at one place in the State than another, it is necessary to allege an intent to destroy competition and thereby create a monopoly. Standard Oil Co. of Ky. *v.* State, 104 Miss., 886 (1913).

"Intentionally, for the purpose of destroying the business of a competitor in any locality." (Michigan, Nebraska, North Dakota, and South Carolina.)

"Intentionally, for the purpose of injuring or destroying the business of a competitor in any locality." (Louisiana.)

"With the intention of creating a monopoly or destroying the business of a competitor." (Minnesota; Utah, and Wisconsin—1909, subtantially same.)

"For the purpose of creating a monopoly or destroying competition in trade." (Oklahoma Constitution.)

"For the purpose of creating a monopoly or destroying the business of a competitor." (Wyoming—1915.)

"For the purpose of destroying the business of a competitor in any locality or creating a monopoly." (Iowa.)

"Maliciously, or for the purpose of destroying the business of a competitor and of creating a monopoly in any locality." (Massachusetts.)

"Intentionally, for the purpose of destroying the business of a competitor in any locality and creating or maintaining a monopoly." (Indiana.)

"Intentionally, or otherwise, for the purpose of destroying the business of a competitor, or creating a monopoly in any locality." (Minnesota—1907.)

"With intent and for the purpose of destroying competition by any regular, established dealer in such commodity or product." (South Dakota—1913.)

"Intentionally, for the purpose of destroying the competition of any regular, established dealer of/in such commodity, or to prevent the competition of any person, who in good faith intends and/or attempts to become such dealer." (Missouri, Oklahoma—1913, South Dakota—1907, Wisconsin—1913, and Utah.) Montana is the same, but inserts "firm or corporation" between "person" and "who." California is substantially the same, but inserts "firm, private corporation or municipal or other public corporation," between "person" and "who."

"With the intention of creating a monopoly, or of destroying the business of a competitor, or of any regular established dealer, or to prevent competition of any person who in good faith intends and attempts to become such a dealer." (North Dakota—1913.)

"With the intention of creating a monopoly, destroying the business of a competitor or restraining in any manner an open competition." (Oregon.)

Discrimination unlawful "if the effect or intent thereof is to establish or maintain a virtual monopoly, hindering competition, or restriction of trade." (New Jersey and Oklahoma—1908.)

No specific intent: Arkansas, Kansas, and Utah statutes respecting news service.

Allowances.—The statutes vary considerably in the provisions relating to the factors to be considered in determining whether there has been any unfair discrimination in the sale or purchase of a commodity. These may be divided into three broad classes:

(*a*) Those permitting the consideration of the difference, if any, in transportation charges. (Kansas, Minnesota—1913, Montana, North Dakota—1913, South Dakota—1907, Wisconsin—1909, Utah—1913, chap. 41, and Wyoming—1911.)

(*b*) Those permitting the consideration of the difference, if any, in the grade or quality of the commodity as well as in transportation charges. (Iowa, Indiana, Louisiana, Massachusetts, Michigan, Minnesota—1907, Missouri, Nebraska, North Dakota—1907, Oregon, Utah, Wisconsin, and Wyoming—1915.)

(*c*) Those permitting the consideration of the above and any difference in quantity. (New Jersey, Oklahoma—1908, and South Carolina.)

California permits the consideration of differences "in the grade, quality or quantity, and for cost differences between such places due to distance from the point of production, manufacture or distribution and expense of distribution and operation."

Mississippi provides for the consideration of "differences of freight and other necessary expenses of sale and delivery" and "differences in the necessary expenses of carrying on the business."

North Carolina prohibits such discriminations "where there is not good and sufficient reason, on account of transportation or the expense of doing business."

With respect to discriminations in furnishing news service the statute of Arkansas is silent as to allowances, and that of Kansas requires the news to be furnished "upon the same terms as to every other newspaper for the same service without discrimination."

Exceptions.—Six States (California, Iowa, Oklahoma, South Dakota—1913, Utah, and Wyoming—1915) permit prices to be made to meet competition. The statute of South Dakota, however, requires "actual legitimate competition."

Another South Dakota statute, prohibiting discrimination in the purchase of commodities, provides that prices may be raised in any given section, "to but not above the prices paid" by others, "when necessary to meet actual legitimate competition in such section."

In California the act "is not intended to prohibit the meeting in good faith of a competitive rate, or to prevent a reasonable classification of service by public utilities for the purpose of establishing rates."

An Oklahoma statute provides that nothing therein contained shall prevent a combination, or any member thereof, "from meeting any price, made by any one not connected in any way with, or influenced by, any member thereof, at any point within this State without being required to make such price generally, so long as such outside party maintains such price in good faith, but no longer, if such point be within the immediate territory of a financially weaker competitor."

Further exceptions are made in Wyoming where the law of 1911 does not apply to "any case where by reason of different railroad rates or other natural things in favor of any manufacturer or dealer of goods of this or another State such manufacturer or dealer sells at a different price than he does in another, in order to meet the competitive rates or other natural things in favor of such other manufacturer or dealer;" nor to "any case where any manufacturer of or dealer in goods manufactured or produced in this State sells products in one place cheaper than in another to meet upon the same or more favorable basis any competition from foreign States, or this State." It is also provided that the act shall not prevent sales at "proper commercial discount customary in the sale of such particular goods."

Evidence.—For provisions relating to evidence necessary to establish a prima facie case under some of the antidiscrimination statutes, see Evidence, burden of proof, indictment, etc., page 208.

Court decisions.—Antidiscrimination statutes have been declared constitutional by courts in Iowa, Minnesota, Mississippi, Nebraska, and South Dakota, and the judgment of the court in the latter State has been affirmed by the Supreme Court of the United States.[1]

[1] *State* v. *Fairmont Creamery Co. of Nebraska, 153 Iowa, 702 (1912).*—Defendant was indicted for a violation of Iowa Code Supplement, section 5028-b, as amended by chapter 222, acts thirty-third general assembly (superseded by Laws 1913, chap. 310), prohibiting discriminations in the purchase of milk, cream, or butter fat for manufacture, or of poultry, eggs, or grain for sale or storage. The statute was assailed as a violation of the State and Federal Constitutions. Section 6 of article 1 of the constitution of Iowa provides that "all laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen or class of citizens, privileges or immunities which upon the same terms shall not belong to all citizens." It was urged that the act was discriminatory and arbitrary in its classification, being limited in its application to specified lines of business, and further limited to particular methods of pursuing the same. Held, that the classification was reasonable and substantial, although the operation of the act is limited to a comparatively few people; and that it did not violate the provisions of the State constitution relating to uniformity of laws and special privileges or the fourteenth amendment of the Federal Constitution. (The law of 1913 applies to discrimination in sales and purchases of any commodity of commerce.)

State ex rel. Young v. *Standard Oil Co., 111 Minn., 85 (1910).*—Action by attorney general to adjudge defendant guilty of unfair discrimination under chapter 269, Laws 1907, and to cancel its license to do business in Minnesota. Among other grounds of demurrer it was urged that the statute was repugnant to section 1 of the fourteenth amendment of the Federal Constitution, and to sections 33 and 34 of article 4 of the State constitution. Demurrer sustained and State appealed. Held, that the legislature may impose special restrictions regulating the sale and distribution of one class of commodities, unless beyond doubt no substantial conditions or usages of trade differentiate that class from others; and that the statute was a valid police regulation. Order sustaining demurrer reversed.

State v. *Bridgeman and Russell Co., 117 Minn., 186 (1912).*—Defendant corporation was indicted for a violation of chapter 468, Laws 1909 (reenacted by chap. 230, Laws of 1913), prohibiting discrimination in the purchase of milk, cream, or butter fat. The question of the constitutionality of the statute was certified to the supreme court. Defendant urged that the act violated the equality clause of the fourteenth amendment of the Federal Constitution, the equality clause, section 2, article 1, and sections 33 and 34,

GENERAL PRICE CUTTING AND OTHER METHODS OF INJURING COMPETITORS.—In addition to the statutes above noted may be mentioned those prohibiting general price cutting or selling below the cost of production for the purpose of injuring competitors.

Idaho penalizes every person, corporation, etc., engaged in business in the State (1) "who shall enter into any contract, combination or conspiracy, or who shall give any direction or authority to do any act, for the purpose of driving out of business any other person engaged therein," or (2) "who for such purpose shall in the course of such business sell any article or product at less than its fair market value, or at a less price than it is accustomed to demand or receive therefor in any other place under like conditions."[1]

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article 4, prohibiting special legislation, of the constitution of Minnesota. Held, that classification was a matter of legislative policy and discretion, and it was only when a classification was manifestly arbitrary that the courts would declare a statute unconstitutional; that the classification in the act in question was not an arbitrary one; and that the statute did not violate the equality provisions of either the Federal or State Constitutions, or the provisions of the latter respecting special legislation.

Standard Oil Co. of Ky. v. *State, 104 Miss., 886 (1915).*—In an action by the attorney general, it was alleged that the Standard Oil Co. of Kentucky offered its products for sale in different places in the State on the same day at different prices, in violation of chapter 119, section 1, of the Laws of 1908. On appeal from an order overruling the company's demurrer, it was contended that the statute was unconstitutional, being in violation of the fourteenth amendment to the Federal Constitution in that it undertook to deny to the individual the right to sell property at such prices and on such considerations as he might choose. Held, that the statutes did not violate either the State or Federal Constitutions; that the purpose of the reduction of prices was the real test; and that the statute did not deny the right to show that the reduction of prices was made not to destroy competition and to create a monopoly, but was due to local conditions or was in furtherance of any other reasonable business policy. The court, however, held that the demurrer should have been sustained on account of failure to conform to the rules of pleading. Subsequently the bill was amended, an order overruling the company's demurrer thereto was affirmed on appeal, and the case remanded for trial, the court holding, as to the contention that the alleged transactions constituted interstate commerce and therefore were subject only to the Federal laws, that the sale and distribution of a commodity, though imported from other States, after being received into the State and becoming incorporated into the general mass of property therein, constituted intrastate commerce and were subject to the State laws (65 So., 468, 1914).

State v. *Drayton, 82 Nebr., 254 (1908).*—Defendant, agent of the Atlas Elevator Co., was charged with discriminating between different sections of the State by selling lumber, lime, plaster, cement, and brick at a lower rate in Orchard, Nebr., than was charged in Brunswick in the same State, contrary to chapter 157, Laws of 1907 (similar to Laws 1913, chap. 117), prohibiting such discrimination in the sale of any commodity in general use. Defendant moved to quash the information. Motion sustained and State appealed. Held, that the act did not prevent any person or corporation from engaging in any lawful business, prevent legitimate competition, interfere with the due management of any business, nor prevent the sale of any commodity at any price which the owner might fix or demand; that it was not class legislation within the constitutional prohibition; that the right to enter into lawful contracts was not abridged; and that the act was within the police power of the State. Exceptions of the State sustained.

Central Lumber Co. v. *South Dakota, 226 U. S., 157 (1912).*—Plaintiff in error was found guilty of unfair discrimination under the laws of South Dakota, 1907, chapter 131, and was sentenced to pay a fine of $200 and costs. It was objected that the statute conflicted with the Federal Constitution as denying the equal protection of the laws, because it affected the conduct of only a particular class—those selling goods in two places in the State—and was intended for the protection of only a particular class—regular established dealers—and also because it unreasonably infringed the liberty of contract. Held, that the fourteenth amendment did not prohibit legislation special in character; that if a class was deemed to present a conspicuous example of what the legislature sought to prevent, it might be dealt with although otherwise not distinguishable from others not embraced in the law; that the statute extended to those who intended to become regular established dealers, and if the same degree of protection was not granted to parties making a transitory incursion into the business, it was not objectionable; and that as to the statute depriving the plaintiff in error of its liberty because forbidding a certain class of dealings, it is enough to say that as the law does not otherwise encounter the fourteenth amendment it is not to be disturbed on this ground.

See also orders of Oklahoma Corporation Commission, p. 203 *n*

[1] Idaho, Laws 1911, chap. 215, sec. 4.

Two other States, Nebraska and South Carolina, have adopted substantially similar laws.[1] The statute of the latter State, however, includes "giving away" as well as selling below cost of manufacture for the purpose of financially injuring competitors and is limited in its application to persons engaged in the manufacture or sale of any article of commerce or consumption from raw material produced or mined within the State. This provision is apparently further qualified by the following:

> Said person * * * or corporation resorting to this method of securing a monopoly in the manufacture, refining and sale of the finished products produced or mined in this State, shall be deemed guilty of a conspiracy to form or secure a trust or monopoly in restraint of trade, etc.

Alabama, while not adopting this form of legislation, penalizes any person or corporation which shall destroy, or attempt to destroy, competition in the manufacture or sale of a commodity.[2]

Mississippi, like Alabama, penalizes individuals, corporations, etc., who shall destroy, or attempt to destroy, competition in the manufacture or sale of a commodity, but adds the words "by selling or offering same at a price below the normal cost of production." [3]

Tennessee prohibits any person, firm, or corporation engaged in manufacturing from giving away or selling for a less price than the cost of manufacture any manufactured article in the State, with the intent and purpose of destroying honest competition.[4]

Texas penalizes any member, agent, employee, officer, director, or stockholder of any business, firm, corporation or association of persons who shall with the intent or purpose of driving out competition or for the purpose of financially injuring competitors sell within the State at less than cost of manufacture or production or sell in such a way or give away within the State products for the purpose of driving out competition or financially injuring competitors, or give secret rebates on such purchase for the purpose aforesaid.[5]

Arkansas penalizes any person or corporation engaged in the manufacture or sale of any article of commerce or consumption produced, manufactured, or mined in the State, or elsewhere, who shall, with the intent and purpose of driving out competition, or for the purpose of financially injuring competitors, sell within the State, at less than cost of manufacture or production, or sell in such a way, or give away in the State, their productions for the purpose of driving out

[1] Nebraska, Comp. Stats., sec. 6302f; South Carolina, Laws 1902, No. 574, sec. 3.
[2] Alabama, Stats., sec. 7581.
[3] Mississippi, Code 1906, as amended by Laws 1908, chap. 119, sec. 1.
[4] Tennessee, Laws 1907, chap. 36, as amended by Laws 1907, chap. 360.
[5] Texas, Rev. Crim. Stats., 1911, art. 1471.

competition, or financially injuring competitors.[1] The provision is apparently qualified by the following:

> Said person, * * * resorting to this method of securing a monopoly within this State in such business, shall be deemed guilty of a conspiracy to form and secure a trust or monopoly in restraint of trade.

Massachusetts prohibits any person, corporation, etc., from combining for the purpose of destroying the trade or business of any person, firm, association, or corporation engaged in selling goods or commodities and of creating a monopoly within the Commonwealth.[2]

North Carolina prohibits any person, corporation, etc., from directly or indirectly, willfully destroying or injuring, or undertaking to destroy or injure, the business of any opponent or business rival in the State "by circulating false reports" tending to damage the credit or character of said opponent or rival, or tending to interfere with the trade of said opponent, with the purpose of attempting to fix the price of anything of value when the competition is removed.[3]

North Carolina prohibits also any person, corporation, etc., from doing, or from having any contract, express or implied, to do, any of the following acts:

1. To wilfully destroy or injure, or undertake to destroy or injure, the business of any opponent or business rival in the State of North Carolina, with the purpose or intention of attempting to fix the price of anything of value when the competition is removed.

2. To buy or sell within the State anything of value which is sold or bought in the State to injure or destroy, or undertake to injure or destroy, the business of any rival, by lowering the price of anything sold, so low, or raising the price of anything bought, so high as to leave an unreasonable or inadequate profit for a time, with the purpose of increasing the profit on the business when such rival is driven out of business, or his, their, or its business is injured.[4]

Oklahoma prohibits a combination[5] or any member thereof from raising or lowering the price of a commodity or lowering the price for services rendered, in the immediate territory of a financially weaker competitor, while, at the same time, it is dealing in a like commodity for a different and more advantageous price, or charging a greater rate for like services at another point within the State, and declares the same to be unfair and destructive competition. The doing of any act which directly or indirectly brings about a similar effect on such weaker competitor is also prohibited. Allowance is to be made for grade or quality of product and freight rate.

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[1] Arkansas, act of 1905, as amended Mar. 12, 1913, sec. 6.

[2] Massachusetts, Laws 1912, chap. 651, sec. 2.

[3] North Carolina, Laws 1911, chap. 167, sec. 1b.

[4] North Carolina, Laws 1913, chap. 41, sec. 5 c, d.

[5] In substance, "combination" is defined as the association together of two or more corporations engaged in the same line of business by the control of certificates of stock or other interest in more than one such corporation by any one of them or by any stockholder thereof.

The combination is permitted, however, to meet the price made by any one not connected with it, or influenced by it, at any particular point within the State.[1]

Wisconsin prohibits combinations, associations, agreements, etc., of two or more persons for the purpose of willfully or maliciously injuring another in his reputation, trade, business, or profession by any means whatever.[2]

REGULATION OF TRANSPORTATION.—The constitutions of Arizona and Washington prohibit corporations, copartnerships, or associations of persons in the State from combining or making any contract with any incorporated company, copartnership, etc., or in any manner whatever to regulate the transportation of any product or commodity.[3]

An Arizona statute prohibits combinations of capital, skill, or acts by two or more persons, corporations, etc., to regulate the transportation of any product or commodity.[4]

Briefly, South Dakota prohibits combinations, understandings, agreements, etc., to regulate the transportation, directly or otherwise, of any product or commodity, so as to obstruct or prevent competition.[5]

New York prohibits foreign corporations engaged in the transportation business in that State, and any partnership or other association or person so engaged from creating, or becoming a party to any pool, trust, agreement or understanding to control the volume of transportation between this country and Europe, or to control, limit, regulate or fix the rates thereof, and further penalizes the refusal to sell transportation between the United States and Europe either eastbound or westbound at the usual and legal rates.[6]

Section 11. Specific provisions affecting agricultural interests.

Aside from the antidiscrimination laws of Indiana, Minnesota, North Dakota, Oregon, Utah, Wisconsin, and Wyoming, which apply

[1] Oklahoma, Laws 1913, chap. 114, secs. 4, 5.

[2] Wisconsin, Stats. 1898, sec. 4466a.

Aikens v. *Wisconsin, 195 U. S., 194 (1904).*—Upon information brought under the Wisconsin statutes of 1898, section 4466a, it was charged that one Aikens and two others, who were managers of three Milwaukee newspapers, conspired together with the intent of willfully and maliciously injuring the Journal Co., the publisher of another Milwaukee paper. It was alleged that this company had given notification of an increase of about 25 per cent in its charges for advertising and that thereupon the managers of these three other papers agreed that if any person should agree to pay the increased rate to the Journal Co. then he should not be permitted to advertise in their papers except at a corresponding increase in rate, but if he should refuse to pay the Journal Co. the increased rate, then he should be allowed to advertise in their papers at the rate previously charged. On writ of error to the Supreme Court of the United States as to the constitutionality of the Wisconsin statute, the judgment of the lower court, finding the three managers guilty as charged, was affirmed, the court holding that this statute is not in conflict with the fourteenth amendment to the Federal Constitution so far as it prohibited combinations intended to do wrongful harm and that the amendment was not intended to protect the liberty to combine to inflict malicious mischief even upon such intangibles as business or reputation.

[3] Arizona, Constitution, Art. XIV, sec. 15; Washington, Constitution, Art. XII, sec. 22.

[4] Arizona, Laws 1912, chap. 73, sec. 1.

[5] South Dakota, Laws 1909, chap. 224, secs. 2, 3, 4, 5.

[6] New York Cons. Laws, Gen. Bus. Law, sec. 350.

to milk, cream, and butter fat, and certain laws of Kansas, Montana, Nebraska, and Tennessee, noted herein under "Pooling" (p. 167) and "Restraint of competition" (p. 159), the following provisions affecting agricultural interests have been adopted:

The constitution of Louisiana (art. 190, adopted Nov. 22, 1913) declares that it shall be unlawful for persons or corporations, or their legal representatives, to combine or conspire together, or to unite or pool their interests, for the purpose of forcing up or down the price of any agricultural product or article of necessity, for speculative purposes.

In Illinois an act to define trusts and conspiracies against trade, etc., one section of which provided that the act should not apply to "agricultural products or live stock while in the hands of the producer or raiser," was declared unconstitutional by the United States Supreme Court, which held that the act, by virtue of this clause, was in contravention of the fourteenth amendment to the Constitution of the United States as denying the equal protection of the laws.[1]

There is a similar provision in the laws of Indiana, Louisiana, Michigan, and Texas.[2]

The statutes of California and Colorado contain a practically identical provision which apparently would exempt agricultural associations from the operation of the antitrust laws:

> No agreement, combination or association shall be deemed to be unlawful or within the provisions of this act, the object and business of which are to conduct its operations at a reasonable profit or to market at a reasonable profit those products which can not otherwise be so marketed, *Provided further*, That it shall not be deemed to be unlawful, or within the provisions of this act, for persons, firms or corporations, engaged in the business of selling or manufacturing commodities of a similar or like character, to employ, form, organize or own any interest in any association, firm or corporation, having as its object or purpose the transportation, marketing or delivery of such commodities.[3]

California prohibits the destruction of "animal, vegetable, or other stuffs, products, or articles, in restraint of trade which are customary food for human beings and are in fit sanitary condition to be used as such."[4]

In Ohio when the violation of the provisions of the antitrust law consists of a combination to control the price or supply or to prevent competition in the sale of bread, butter, eggs, flour, meat, or vegetables or any one of said articles, the person or persons thus engaged are subject to greater punishment than in other cases.[5]

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[1] Illinois, act of June 20, 1893, sec. 9; Connolly *v.* Union Sewer Pipe Co., 184 U. S., 540 (1902). (See p. 97.)

[2] Indiana, Burns R. S., 1914, sec. 3881; Louisiana, Laws 1892, act 90, sec. 8; Michigan, Howell's Stats., 1913, sec. 14892; Texas, Rev. Crim. Stats. 1911, Art. 1477.

[3] California, Laws 1907, chap. 530, sec. 1, amended by Laws 1909, chap. 362; Colorado, Laws 1913, chap. 161, sec. 1.

[4] California, Laws 1913, chap. 233, sec. 1.

[5] Ohio, G. C., sec. 6396, as amended May 3, 1913.

The law of Florida prohibits arrangements, trusts, combinations, etc., between persons and corporations, made with a view to, or tending to prevent, hinder, or obstruct the lawful sale in the State of beef or other fresh meat of cattle or any other edible animal raised, fattened, or fed in the State, or any other beef or fresh meat, or with a view to or tending to prevent, hinder, or obstruct the lawful sale of any cattle, etc., in the State, or which shall tend to monopolize or control the sale or price of fresh meat in the State.[1]

Washington prohibits commission merchants from entering into any combination, conspiracy, or pool for the purpose of artificially raising or depressing the market price of any farm, dairy, orchard, or garden produce, or of excluding from the market the produce of any particular locality grown or manufactured by any person within the State.[2]

Colorado has substantially a similar provision, but includes a "gentlemen's agreement," and further prohibits the making of "any unfair, unreasonable, or unjust discrimination in any of these respects."[3]

Section 12. Specific provisions affecting labor.

In Wisconsin it is provided that nothing in the antitrust act of 1893 shall be construed to affect labor unions or any other association of laborers organized for the purpose of promoting the welfare of its members.[4]

In Louisiana the provisions of the antitrust act of 1892 do not affect any combination or confederation of laborers for the purpose of procuring an increase of their wages or redress of grievances.[5]

In Montana the provisions of the antitrust law of 1909 do not apply to any arrangements, agreement, or combination between laborers made with the object of lessening the number of hours of labor or increasing wages.[6]

The law of Michigan declares that the provisions of the antitrust act shall not apply to services of laborers or artisans who are formed into societies or organizations for the benefit and protection of their members.[7]

In California and Colorado, labor, whether skilled or unskilled, is not a commodity within the meaning of the antitrust law.[8]

A law of Oklahoma declares that no agreement, combination, or contract by or between two or more persons to do or procure to be

[1] Florida, Comp. Laws 1910, sec. 3160.
[2] Washington, Remington & Ballinger's Code (1910), sec. 7032.
[3] Colorado, Laws 1913, chap. 58, sec. 12.
[4] Wisconsin Stats. (1913), sec. 1747h.
[5] Louisiana, Laws 1892, Act 90, sec. 8.
[6] Montana, Laws 1909, chap. 97, sec. 2.
[7] Michigan, Howell's Stats. (1913), sec. 14892.
[8] California, Laws 1907, chap. 530, as amended by Laws 1909, chap. 362; Colorado, Laws 1913, chap. 161, sec. 1.

done, or not to do or procure to be done, any act, in contemplation or furtherance of any trade dispute between employers and employees in the State, shall be deemed as criminal, nor shall those engaged therein be indictable or otherwise punishable for the crime of conspiracy if such act committed by one person would not be punishable as a crime, nor shall such agreement, combination, or contract be considered as in restraint of trade or commerce, nor shall any restraining order or injunction be issued with relation thereto. It is provided also that nothing in this act shall be construed to authorize force or violence.[1]

Kansas provides that in cases involving the relations of employer and employee, or in cases between employees, or persons employed and persons seeking employment, no injunction shall issue without notice. A restraining order may be so issued under certain conditions but it shall be indorsed of record, shall define the injury and state why it is irreparable and why the order was granted without notice and that the order shall expire in not to exceed seven days; further, no such injunction or restraining order shall be granted unless necessary to prevent irreparable injury to property or to a property right and for which there is no adequate remedy at law; nor shall such processes prohibit any person or persons from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means to do so; or from attending at or near a house or place where any person resides or works, or carries on business, or happens to be for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute; or from recommending, advising, or persuading others by peaceful means to do so; or from paying or giving to or withholding from any person engaged in such dispute any strike benefits or other moneys or things of value; or from peaceably assembling at any place in a lawful manner and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto.[2]

Massachusetts provides that it shall not be unlawful for persons employed or seeking employment to enter into any arrangements, agreements or combinations with the view of lessening the hours of labor, increasing their wages, or bettering their condition; that no restraining order or injunction shall be granted in any case involving the relations of employer and employee or persons employed and

[1] Oklahoma, Comp. Laws 1909, sec. 4042.

State v. *Coyle*, *128 Pac.*, *243* (*Okla. 1912*).—Held, that the above-cited law must be considered as a part of the antitrust act, and that construed together the antitrust law did not violate either the constitution of Oklahoma or the fourteenth amendment to the Federal Constitution.

[2] Kansas, Laws 1913, chap. 233.

persons seeking employment, unless necessary to prevent irreparable injury to property or property rights, and there is no adequate remedy at law, and, further, such property or property right shall be particularly described and sworn to in the application; that rights existing under or growing out of the relations of employer and employee shall be construed to be personal and not property rights; that, in all cases involving violations of the contract of employment, parties shall be left to their remedy at law unless irreparable damage is about to be committed; that no persons who are employed or seeking employment, etc., shall be indicted, prosecuted, or tried, etc., for entering into any arrangement, etc., for the purposes stated above or for any act done in pursuance thereof, unless such act is in itself unlawful.[1]

It also provides in substance that when a strike, lockout, or other labor trouble exists, the employer, if attempting to fill the places of the strikers, etc., shall plainly and explicitly mention such conditions. This law operates in a particular case until the State Board of Conciliation and Arbitration decides that the employer's business has resumed its normal and usual manner.[2]

Section 13. Holding companies.

The constitution of Georgia (Art. IV, sec. 2) provides that the general assembly shall have no power to authorize any corporation to buy shares or stock in any other corporation, or to make any contract or agreement whatever with any such corporation, which may have the effect or be intended to have the effect to defeat or lessen competition in their respective business, or to encourage monopoly; and that all such contracts and agreements shall be illegal and void.

The Oklahoma constitution (Art. IX, sec. 41) declares that no corporation chartered or licensed to do business in the State shall own, hold, or control in any manner whatever the stock of any competitive corporation, or corporations engaged in the same kind of business in or out of the State, except stock pledged to secure debt, or acquired in satisfaction of debt, and stock so acquired shall be disposed of within 12 months. While owned it shall have no right to participate in the control of the corporation, except with the consent of the State Corporation Commission. Banks and trust companies are subject to similar restrictions except that the consent of the State Corporation Commission to participate in the control of the corporation is not expressly required.

Massachusetts prohibits any one in his individual capacity, or acting for a corporation, etc., from securing or holding the control of corporate stock for the purpose of evading the provisions of the anti-

[1] Massachusetts, Laws 1914, chap. 778.

[2] Massachusetts, Laws 1914, chap. 347.

discrimination statute.[1] This State also prohibits a manufacturing or other corporation which has its place of business in a city or town in which a gas company proposes to manufacture gas for light, from holding more than 10 per cent of the capital stock of such gas company;[2] and also provides that, after January 1, 1918, it shall be unlawful for a trust company to hold more than 10 per cent of the capital stock of any other trust company.[3]

Mississippi prohibits the formation of combinations, contracts, etc., to issue, own, or hold the certificates of stock of any trust or combine.[4] Another section of the Mississippi laws provides that no corporation shall directly or indirectly acquire any part of the capital stock of any other competing corporation doing business in the State, nor directly or indirectly acquire the franchise, plant, or equipment of any competing corporation in the State.[5]

Mississippi, by an act of 1914, also provides that "no part of the stock of any bank except regional reserve banks, doing business in this State shall be owned by any bank under the provisions of this act."[6]

Mississippi further forbids corporations to own, rent, or otherwise acquire any interest in any cotton gin, where such corporation is interested or participates in the manufacture of any cottonseed oil, or any of its products or by-products, or in the manufacture of cottonseed meal, hulls or other cottonseed products or by-products, or which has any interest in any compress business. A cottonseed oil company or compress may operate ginneries of the capacity of not exceeding 600 saws, but such ginneries must be located in the city or town of the location of its cotton-oil plants or compresses, and it is provided that such ginneries shall not be operated for the purpose of destroying the ginning business.[7]

Nebraska prohibits any corporation from doing business in the State a majority of whose stock is owned or controlled or held in trust for any other corporation which conducts its business elsewhere in a manner that would be prohibited by the Nebraska laws if so conducted within the State.[8]

New Jersey provides as follows:

No corporation heretofore organized or hereafter to be organized under the provisions of the act to which this is an amendment, or the amendments thereof or supplements thereto, except as otherwise provided therein or thereby, shall hereafter purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of the

[1] Massachusetts, Laws 1912, chap. 651, sec. 4.
[2] Massachusetts, Laws 1914, chap. 742, sec. 64.
[3] Massachusetts, Laws 1914, chap. 504, sec. 1.
[4] Mississippi, Code, sec. 5002, as amended by Laws 1908, chap. 119, sec. 1.
[5] Mississippi, Code 1906, sec. 5005, as amended by Laws 1910, chap. 223.
[6] Mississippi, Laws 1914, chap. 124, sec. 64.
[7] Mississippi, Laws 1914, chap. 162, sec. 1.
[8] Nebraska, Stats., 6302g.

shares of the corporate stock of any other corporation or corporations of this or any other State, or of any bonds, securities or other evidence of indebtedness created by any other corporation or corporations of this or any other State, nor as owner of such stock exercise any of the rights, powers and privileges of ownership, including the right to vote thereon. *Provided*, that nothing herein contained shall operate to prevent any corporation or corporations from acquiring the bonds, securities or other evidences of indebtedness created by any non-competing corporation in payment of any debt or debts due from any such non-competing corporation; nor to prevent any corporation or corporations created under the laws of this State from purchasing as a temporary investment out of its surplus earnings, reserved under the provisions of this act, as a working capital, bonds, securities or evidences of indebtedness created by any non-competing corporation or corporations of this or any other State, or from investing in like securities any funds held by it for the benefit of its employees or any funds held for insurance, rebuilding or depreciating purposes; nor to prevent any corporation or corporations created under the laws of this State from purchasing the bonds, securities or other evidences of indebtedness created by any corporation the stock of which may lawfully be purchased under the authority given by section forty-nine of the act entitled "An act concerning corporations (Revision of 1896)";[1] *provided, also*, that nothing herein contained shall be held to affect or impair any right heretofore acquired in pursuance of the section hereby amended, by any corporation created under the laws of this State.[2]

The New York Stock Corporation Law permits corporations, under certain conditions, to hold stock in other corporations, but moneyed corporations are expressly excepted.[3] Another statute provides that no stock corporation other than a railroad, street railroad, or electrical corporation, shall hold more than 10 per cent of the total capital stock issued by any railroad, street railroad, or other common carrier, organized or existing under the laws of this State. Also, that no corporation other than a gas, electrical, or street railroad corporation shall hold more than 10 per cent of the total capital stock of any gas or electrical corporation organized or existing under the laws of New York.[4]

Ohio provides that corporations may hold stock in kindred but not competing corporations, but that this provision shall not authorize the formation of a trust or combination for the purpose of restricting trade or competition.[5]

Oklahoma statutes prohibit any corporation from owning, holding, or controlling in any manner whatever "the stock of any competitive corporation or corporations engaged in the same kind of business, in

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[1] While this report was on the press this law was amended by the insertion of the following between "1896" and "provided, also:" *Nor to prevent any corporation created under the laws of this State from purchasing the stock, bonds, securities or evidences of indebtedness of any other corporation or corporations of this or any other State solely for investment, and not using the same by voting or otherwise to restrain trade or to bring about, or in attempting to bring about, the substantial lessening of competition.* (New Jersey, Laws 1915, chap. 114.)

[2] New Jersey, Laws 1913, chap. 18, amending "An Act concerning corporations (Revision of 1896)," approved Apr. 21, 1896.

[3] New York Stock Corporation Law, sec. 52.

[4] New York Public-Service Commission Law, secs. 54 and 70, as amended by Laws 1911, chap. 788 and Laws 1914, chap. 220.

[5] Ohio, G. C., sec. 8683.

or out of this State, in violation of the Constitution and laws of this State." [1]

Texas prohibits any corporation from acquiring in any way the stock, bonds, or franchises or other rights or the physical properties or any part thereof of another corporation where the purpose or effect of such acquisition is to lessen competition.[2]

Wyoming provides that it shall not be lawful for a corporation to use its funds in the purchase of stock in any other company, but that such corporation may hold stock in any other company that may be subsidiary or tributary thereto and that does contribute to the objects and purposes of the holding corporation.[3]

The Code of the District of Columbia prohibits any company from using any of its funds in the purchase of any stock in any other corporation.[4]

Section 14. Special provisions affecting business declared to be of public consequence.

Briefly, the Idaho and Nebraska laws provide that in certain cases corporations, associations, etc., may be enjoined from continuing in business in the State, but if in the judgment of the attorney general such corporation is one on which the public is so dependent that the interruption of its business will cause serious public loss or inconvenience he may refrain from proceeding to obtain a decree which will absolutely prevent the continuance of such business, and may apply for a limited or conditional decree, or one to take effect at a future day. The court, for the same reasons, may take such action and may also, in its discretion, enjoin officers, agents, or servants of such corporations, etc., from continuing in its service and enjoin such corporation from continuing their employment therein, as the case shall seem to require.[5]

The Oklahoma antitrust law of 1908 provides that "whenever any business, by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or offered, or the commodities bought or sold therein or offered or taken by purchase or sale in such a manner as to make it of public consequence, or to affect the community at large as to supply, demand, or price, or rate thereof, or said business is conducted in violation of the first section of this Act,[6] said business is a public business, and subject to be controlled by the State, by the Corporation Commission or by an action

[1] Oklahoma, Laws 1908, chap. 83, sec. 11.
[2] Texas, Laws 1903, Chap. XCIV, sec. 2.
[3] Wyoming, Comp. Stats., 1910, sec. 3983.
[4] District of Columbia Code, sec. 620.
[5] Idaho, Laws 1911, chap. 215, sec. 7; Nebraska, Stats., sec. 6302k.
[6] Sec. 1 declares illegal every act, agreement, contract, or combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, within the State, which is against public policy.

in any district court of the State, as to all of its practices, prices, rates and charges." It is further declared to be the duty of any person, corporation, etc., engaged in any public business to render its services or offer its commodities upon reasonable terms without discrimination and adequately to the needs of the public, considering the facilities of said business.[1]

In Wisconsin, if any improvement maintained under any franchise granted pursuant to chapter 755, Laws of 1913, shall be owned, leased, trusteed, possessed, or controlled by any device permanently,

[1] Oklahoma, Laws 1908, chap. 83, sec. 13.

Under the authority of this section the Corporation Commission directed the Tishomingo Ice & Cold Storage Co. to deliver ice to all persons in Tishomingo, required scales to be carried on each wagon and ice to be weighed when requested by consumers; fixed the price at which the Ada Ice & Fuel Co. should sell ice to different classes of consumers in Ada; directed the Mangum Ice & Cold Storage Co. to deliver ice to all parties within the corporate limits of Mangum and fixed the prices; directed the Geary Light & Ice Co. to keep its plant clean and sanitary and to adopt measures to protect ice in process of manufacture from contamination; imposed a fine of $100.00 on the Pauls Valley Ice Co. for refusing to deliver ice as directed in a previous order; and directed the Tishomingo Ice & Cold Storage Co. to deliver ice to consumers and fixed the price thereof.

A complaint alleging that a certain cotton buyer paid more for cotton ginned by his gin than for cotton ginned by others, was dismissed by the Commission, which held that there being several cotton buyers in the town without any understanding or combination as to prices, a virtual monopoly did not exist, and that they had no jurisdiction of such a case.

The Harriss-Irby Cotton Co. was directed to gin custom cotton at prices fixed by the Commission. Held, that before a person who had dedicated private property to a public use could withdraw the same, he must give a reasonable notice in advance of such action. Appealed to State Supreme Court and dismissed for want of jurisdiction.

Regulations for weighing cotton at compresses were prescribed; the Commission holding that where cotton was "docked" for dampness or other causes, the actual weights together with the amount each bale was "docked" should be submitted to both parties and that the cotton should be reweighed at the request of either party. The Commission states that this order was resisted at the time it was issued, but that it has been complied with, has given satisfaction, and that both buyers and the compresses would now object to its repeal.

Certain oil companies selling oil stoves to farmers agreed to furnish them oil in barrel lots at jobber's prices. After stoves were installed, local dealers objected to this arrangement. Complaint was filed and the Commission directed the Waters-Pierce Oil Co., the Texas Co., and the Oklahoma Oil Co. to sell kerosene in quantities of one barrel or more at the same price. The Commission states that this order is being strictly obeyed.

The Texas Oil Co. and the Waters-Pierce Oil Co. were directed to sell gasoline in Idabel, Okla., at the same price as in other sections of the country, plus any additional transporation charge and distributing expense.

The Mellon Co., a retail dry goods house, filed a complaint alleging that the Daily Oklahoman had a virtual monopoly of all morning advertising in Oklahoma City and had refused to accept its advertising because of a controversy over other business transactions, and asked that the newspaper be required to advertise for the complainant at the same rate charged similar concerns. The Commission found that it was the duty of the Oklahoman to advertise for the Mellon Co. but made no order. The newspaper, however, complied with the suggestions of the Commission.

Upon a complaint filed by an independent lumberyard, alleging that other yards were selling at or below cost for the purpose of destroying competition, the Commission directed the lumberyards at Cherokee to sell lumber to all without discrimination in price for the same quality and quantity, and that lumber should not be sold without a profit for the purpose of driving a competitor out of business.

A complaint asking that the Cordell Gin & Milling Co. be required to sell its products to certain retail merchants was dismissed, the Commission holding that it had no jurisdiction in the regulation of a private business which deals with the public unless a virtual monopoly is shown.

Five laundries which combined under the name of the Oklahoma Operating Co., and increased prices were directed not to increase their prices over those charged prior to the combination without securing the permission of the Commission after a proper showing that the prices should be advanced. Held, further, that the Commission had no jurisdiction to dissolve the combination, this being for the courts. The Commission states that "the order in this case has been complied with to the letter, and the people do not complain of the combination but all are apparently satisfied."

The Mahoney Bus, Baggage, Carriage & Taxicab Co. was directed to transfer all baggage under similar conditions for the same price and to accept any baggage tendered.

temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that the same form part of, or in any way effect any combination, or shall be in any wise controlled by an unlawful trust, or form the subject of any contract or conspiracy to limit the output of any hydraulic or hydroelectric power derived therefrom or in any manner or in any degree in restraint of trade in the generation, sale, or distribution of hydraulic or hydroelectric power derived therefrom, the State may take possession as in cases of receivership, and the members of the railroad commission shall act as receivers during such period as the court may determine.[1]

The law of Texas declares all buildings which are used for public performances, the production or exhibition of plays, and shows of whatever nature, to which admission fees are charged, to be "public houses of amusement" and subject to regulation. It is further declared unlawful to discriminate against reputable shows or other productions. Failure or refusal to rent such houses of amusement upon such terms as shall not be deemed unreasonable, extortionate, or prohibitive is a misdemeanor. If it be shown that such houses have been already rented and that other bookings have, in good faith, been made for the dates applied for, and that such renting and booking was not with the intention of evading the act, the penalties will not be imposed. The persons in charge of such houses are required to keep a list of all bookings, with the dates specifically set out, and to exhibit same upon request to those who, in good faith, desire to rent such houses.[2]

The law of Utah provides that all persons, associations, and corporations engaged in the business of buying, gathering, or accumulating information or news for publication, and vending, supplying, distributing, or disseminating the same for publication, either to their members or otherwise, shall be deemed to be engaged in a business upon which a public interest is ingrafted, and shall make no distinction with respect to newspaper publishers desiring to purchase such news or information for publication.[3]

Section 15. Recognition of common-law principles.

A few of the State antitrust statutes contain specific references to the common law.

In the Michigan antitrust law of June 16, 1905, it is provided that nothing in this act shall be construed to impair or invalidate agreements or contracts known to the common law and in equity as those relating to good will of trade.[4]

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[1] Wisconsin, Stats. 1913, secs. 1596-72.

[2] Texas, Rev. Crim. Stats., 1911, arts. 1480-1482.

[3] Utah, Comp. Laws, 1907, sec. 1762x. Cf. Kansas, Gen. Stats., 1909, chap. 85; and Arkansas Laws, 1913, Act No. 51.

[4] Michigan, P. A. 1905, No. 229, sec. 1.

Section 1 of the antitrust act of June 20, 1905, provides that "all agreements and contracts by which any person, copartnership or corporation promises or agrees not to engage in any avocation, employment, pursuit, trade, profession or business, whether reasonable or unreasonable, partial or general, limited or unlimited, are hereby declared to be against public policy and illegal and void."

Section 6, however, provides that "this act shall not apply to any contract mentioned in this act nor in restraint of trade, where the only object of the restraint imposed by the contract is to protect the vendee or transferee of a trade, pursuit, avocation, profession or business, or the good will thereof, sold and transferred for a valuable consideration in good faith and without any intent to create, build up, establish or maintain a monopoly."[1]

In North Carolina, the antitrust law of 1913 provides, "that any act, contract, combination in the form of trust, or conspiracy in restraint of trade or commerce which violates the principles of the common law is hereby declared to be in violation of section one of this act," but provides further, "that nothing herein shall be construed to prevent a person, firm or corporation from selling his or its business and good will to a competitor, and agreeing in writing not to enter the business in competition with the purchaser in a limited territory, as is now allowed under the common law: Provided, such agreement shall not violate the principles of the common law against trusts and shall not violate the provisions of this act."[2]

Mississippi prohibits combinations, contracts, understandings, or agreements, expressed or implied, to engross or forestall a commodity.[3]

The Georgia Code provides that "a contract which is against the policy of the law can not be enforced; such are contracts * * * in general in restraint of trade."[4] Forestalling, engrossing, or regrating is prohibited.[5]

Massachusetts declares illegal "every contract, agreement, arrangement or combination in violation of the common law in that thereby a monopoly in the manufacture, production or sale in this commonwealth of any article or commodity in common use is or may be created, established or maintained," etc.[6]

Section 16. Administration.

With respect to the officials charged with the duty of enforcing the antitrust laws, the statutes may be divided into four broad classes:

(*a*) Those which impose this duty upon the attorney general.

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[1] Michigan, P. A. 1905, No. 329, secs. 1, 6.
[2] North Carolina, Laws 1913, chap. 41, secs. 2, 5.
[3] Mississippi, Code 1906, sec. 5002, as amended by Laws 1908, chap. 119, sec. 1.
[4] Georgia, Code 1914, sec. 4253.
[5] Georgia, Code 1914, sec. 707.
[6] Massachusetts, Laws 1908, chap. 454, sec. 1.

(*b*) Those which impose the duty upon the attorney general and/or county or district attorneys or solicitors.

(*c*) Those which impose the duty upon county or district attorneys, but under the direction of the attorney general.

(*d*) Those which impose the duty upon county or district attorneys.

In addition to the provisions noted above may be mentioned those which authorize certain proceedings by, or at the instance of, private citizens.

ATTORNEYS GENERAL.—In 26 States (Arkansas, California, Colorado, Florida, Idaho, Indiana, Kansas, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Wisconsin, and Wyoming) the attorney general is required to enforce the antitrust laws or certain provisions thereof, especially in proceedings to annul charters or revoke the right of a foreign corporation to do business in the State.[1]

ATTORNEYS GENERAL—COUNTY OR DISTRICT ATTORNEYS.—In 22 States (Arizona, California, Colorado, Florida, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, and Wyoming), some of which require certain provisions to be enforced by the attorney general, as noted above, the general enforcement of the law is left to the attorney general and/or county or district attorneys.[2]

The law of Texas, noted above, provides that "prosecutions under this act may be instituted and prosecuted by any county or district attorney of this State, and when any such prosecutions have been

[1] Arkansas, Laws 1913, No. 161, secs. 10, 11; California, Laws 1907, chap. 530, sec. 3; Colorado, Laws 1913, chap. 161, sec. 4; Florida, Comp. Laws, 1914, sec. 3161; Idaho, Laws 1911, chap. 215, secs. 5, 7; Indiana, Burn's Ann. St., sec. 3879; Kansas, Laws 1899, chap. 293, sec. 4, Laws 1905, chap. 2, sec. 3, Laws 1909, chap. 261, sec. 1; Louisiana, Laws 1892, Act 90, secs. 2, 3, Laws 1908, Act 128, sec. 4; Massachusetts, Laws 1913, chap. 709, sec. 1; Michigan, P. A. 1899, No. 255, sec. 3, P. A. 1905, No. 229, sec. 5, P. A. 1913, No. 135, secs. 5, 7; Mississippi, Code 1906, sec. 5005, as amended by Laws 1910, chap. 223, Code 1906, sec. 5006; Missouri, R. S., chap. 98, sec. 10318; Montana, Laws 1913, chap. 7, sec. 2, chap. 8, sec. 2; Nebraska, Comp. Stats., 1911, secs. 6302e, 6302h, 6302k, Laws 1913, chap. 114; New Jersey, Laws 1913, chap. 13, sec. 4; New York, Cons. Laws, chap. 20, sec. 342; North Carolina, Laws 1913, chap. 41, sec. 13; North Dakota, Laws 1907, chap. 259, secs. 10, 11, Laws 1907, chap. 260, secs. 5, 7, Laws 1913, chap. 287, sec. 2; Ohio, G. C., sec. 6394, as amended by Act of May 8, 1913; Oklahoma, act of June 10, 1908, secs. 2, 8, 12, Laws 1913, chap. 114, sec. 2; South Carolina, Civ. Code, 1912, sec. 2438; Tennessee, Laws 1903, chap. 140, sec. 2; Texas, Laws 1903, Chap. XCIV, sec. 8; Utah, Laws 1913, chap. 41, sec. 2; Wisconsin, Stats., secs. 1791l, 1770l, 1791n-11, 1791n-12; Wyoming, Laws 1911, chap. 62, secs. 3, 4.

[2] Arizona, Laws 1912, chap. 73, sec. 4; California, Laws 1907, chap. 530, sec. 2; Colorado, Laws 1913, chap. 161, secs. 3, 5, 8; Florida, G. S. 1906, sec. 3163; Illinois, Act of June 11, 1891, as amended in 1893 and 1907, sec. 8; Indiana, Antitrust Law of 1907, sec. 5; Iowa, Code sec. 5067; Kansas, G. S., secs. 5145, 5146, 5191; Louisiana, Laws 1892, No. 90, sec. 4; Massachusetts, Laws 1912, chap. 651, sec. 6; Michigan, P. A. 1899, No. 255, sec. 2, P. A. 1913, No. 135, sec. 4; Minnesota, Stats., sec. 8974; Mississippi, Code 1906, sec. 5004, as amended by Laws 1910, chap. 222, Code 1906, sec. 5016, as amended by Laws 1908, chap. 204; Missouri, R. S., chap. 98, as amended in 1913, secs. 10303, 10317, 10326; Nebraska, Comp. Stats., sec. 6301h; North Dakota, Laws 1907, chap. 259, sec. 14, and chap. 260, sec. 4; Ohio, G. C., sec. 6400, as amended by Act May 8, 1913; Oklahoma, Act June 10, 1908, sec. 9; South Carolina, Laws 1902, No. 574, secs. 4, 7; South Dakota, Laws 1909, chap. 224, sec. 8; Texas, Laws 1903, Chap. XCIV, as amended by G. L. 1907, chap. 456, sec. 21; Wyoming, Laws 1911, chap. 62, sec. 2.

instituted by any county or district attorney, such officer shall forthwith notify the Attorney General of such fact, and it is hereby made the duty of the Attorney General, when he shall receive such notice, to join such officer in such prosecution and do all in his power to secure the enforcement of this act." [1]

ATTORNEY GENERAL—COUNTY OR DISTRICT ATTORNEYS UNDER DIRECTION OF ATTORNEY GENERAL.—Six States (Idaho, Massachusetts, North Carolina, Ohio, Texas, and Utah) provide that these laws, or certain provisions thereof, may be enforced by the attorney general or by county or district attorneys under the direction of the attorney general. In Wisconsin the district attorneys institute proceedings under certain sections of the law upon the "advice" of the attorney general.[2]

COUNTY OR DISTRICT ATTORNEYS.—In some instances the duty of enforcing the law is given directly to county or district attorneys.

In Kansas the neglect or refusal of the county attorneys to enforce the law of 1889 is a misdemeanor punishable by fine and imprisonment and forfeiture of office. Upon such neglect or refusal the attorney general is charged with the duty of enforcing the law.[3]

In Louisiana the criminal provisions of the antidiscrimination act are enforced by the district attorneys, the attorney general appearing in appeals.[4]

In Missouri the prosecuting attorneys are required to proceed against corporations for the forfeiture of charters or the right to do business upon the failure of such corporations to file certain affidavits required by law.[5]

PROCEEDINGS BY OR ON BEHALF OF PRIVATE CITIZENS.—The Indiana antitrust law of 1907 provides that proceedings to prevent or restrain violations of the laws on this subject may be filed by the attorney general upon his own relation or that of any private person, and that an information may be filed by any taxpayer on his own relation.[6]

In Michigan it is the duty of the attorney general to file an information in the nature of quo warranto, upon his own relation, or the relation of any person, on leave granted, against any corporate body whenever it shall violate any of the provisions of the antitrust act of June 16, 1905.[7]

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[1] Texas, Laws 1903, Chap. XCIV, as amended by G. L. 1907, p. 456, sec. 21.

[2] Idaho, Laws 1911, chap. 215, sec. 18; Massachusetts, Laws 1908, chap. 454, sec. 2; North Carolina, Laws 1913, chap. 41, sec. 13; Ohio, G. C., sec. 6395; Texas, Laws 1903, Chap. XCIV, secs. 11, 15, as amended by Acts 1907, p. 221, and 1909, pp. 281-282, G. L. 1907, p. 16, secs. 2, 5, G. L. 1907, p. 175, secs. 3, 5; Utah, Stats., sec. 1760; Wisconsin, Stats. 1898, sec. 1747f.

[3] Kansas, Laws 1889, chap. 257, sec. 7; G. S., sec. 5191.

[4] Louisiana, Laws 1908, act 128, sec. 4.

[5] Missouri, R. S., chap. 98, sec. 10322.

[6] Indiana, Antitrust Law, 1907, sec. 5.

[7] Michigan, P. A. 1905, No. 229, sec. 5.

The law of Massachusetts provides that upon complaint on oath filed in the supreme judicial court, or superior court, if it appears that certain prohibited contracts, combinations, practices, etc., exist, the court shall order respondents to show cause why a master should not be appointed to hear and report upon such complaint. If cause be not shown, the court is required to appoint a master for such purposes. The report, if affirmed by the court, is required to be sent to the attorney general for such action as it may warrant.[1]

The South Dakota antitrust act of 1909 provides that any person may complain to any court of competent jurisdiction of violations of this act, and in such case the court shall issue a warrant and proceed the same as though the State's attorney had made the complaint, and the court may also permit any attorney whom the complainant may employ to appear and prosecute such action at any stage of the proceedings.[2]

In Florida any citizen may institute and prosecute a suit in his own name to enforce the antitrust law.[3]

MISCELLANEOUS PROVISIONS.—In Arizona and Kansas the law provides in substance that it shall be the duty of all State and county officers having knowledge of violations of the antitrust law to notify county attorneys in their respective counties, and the attorney general, and to furnish the names of witnesses. Upon failure to comply, such officer shall be fined and forfeit office.[4] Kansas imposes this duty on municipal officers also.[5]

The law of Illinois provides that the informer shall be paid one-fifth of the fine recovered.[6]

In Mississippi it is the duty of the several circuit judges to specially call the attention of the grand juries to the provision imposing penalties for violation of the antitrust law.[7]

In Alabama, Indiana and Tennessee there are somewhat similar provisions.[8]

The law of New York provides that the department of foods and markets shall cause to be initiated proper proceedings to prevent restraint of trade or unlawful combinations to fix prices.[9]

Section 17. Evidence, burden of proof, indictments, etc.

In Illinois it is provided that in all cases under the provisions of the antitrust act of June 11, 1891, a preponderance of evidence in favor

[1] Massachusetts, Laws 1911, chap. 503.
[2] South Dakota, Laws 1909, chap. 224, sec. 8.
[3] Florida General Stats. 1906, sec. 3163.
[4] Arizona, Laws 1912, chap. 73, sec. 10; Kansas, G. S., sec. 5150.
[5] Kansas, G. S., sec. 5192.
[6] Illinois, act of June 11, 1891, amended in 1893 and 1907, sec. 8.
[7] Mississippi, Code 1906, sec. 5004, as amended by Laws 1910, chap. 222.
[8] Alabama, Code, sec. 7582; Indiana, Stats. sec. 3883; Tennessee, Laws, 1903 ch. 140, sec. 5.
[9] New York, Laws 1914, chap. 245, sec. 20-h.

of the people shall be sufficient to authorize a verdict and judgment for the people.[1]

California, Michigan, and Utah provide that the character of the trust or combination alleged may be established by proof of its general reputation as such.[2]

Mississippi Code of 1906, section 5007, as amended by Laws 1912, chapter 250, providing for the recovery of $500 and actual damages by any person injured or damaged by a trust or combine, provides further that "in any suit under this section, proof by any party plaintiff that he has been compelled to pay more for any commodity, or to accept less for any commodity, or to pay more for any service rendered by any corporation exercising a public franchise, by reason of the unlawful act or agreement of the defendant trust, its officers, agents or attorneys than he would have been compelled to give or accept but for such unlawful act or agreement, shall be prima facie evidence of damage, and in every such case proof of an unlawful purpose or agreement to raise or lower price or cost shall be prima facie evidence that such price or cost was raised or lowered by reason of such purpose or agreement."

Missouri provides by section 10313a, added to the Revised Statutes in 1913, that in any proceeding against or prosecution of any insurance company, under the provisions of this article, it shall be prima facie evidence that such company is a member of a pool, trust, understanding, etc., to control, effect, or fix the price or premium to be paid for insuring property, if it be shown that such company or its representative, in writing insurance, has used any insurance rate, or made use of or consulted any rate book, paper, or card containing any insurance rate prepared, published, kept, or furnished by any person, association of persons, or bureau employed by, or acting on behalf of, any other insurance company or association in and about the making and publishing of insurance rates for use in any portion of the State.[3]

The Nebraska antidiscrimination statute provides in substance that proof that any person, corporation, etc., has been discriminating between different sections, etc., by selling a commodity at a lower rate in one section, etc., than is charged by said party in another section, after making allowance for the difference in grade or quality and in cost of transportation, shall be prima facie evidence of unfair discrimination. A similar clause, with the necessary changes, applies to the section prohibiting discriminations in the purchase of commodities.[4]

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[1] Illinois, Laws 1891, p. 206, sec. 7.

[2] California, Laws 1907, chap. 530, sec. 6; Michigan, P. A. 1899, No. 255, sec. 6; Utah, Comp. Laws, 1907, sec. 1762x5 (an antidiscrimination act). A similar section of the Ohio law was declared void as violative of the due process clause of the Constitution of the United States. (Hammond v. State, 78 Ohio St., 15).

[3] Missouri, Laws 1913, p. 555.

[4] Nebraska, Laws 1913, chap. 117, sec. 1.

Louisiana prohibits discrimination by selling at a lower rate in one section than another, after making due allowance for the difference in the grade or quality and cost of transportation, and provides that all sales "so made" shall be prima facie evidence of unfair discrimination.[1]

In Mississippi, under a law substantially similar, a prima facie case is established by showing "a sale or offer of sale of commodity at a lower price at one place in this State than another," or by showing a lower charge for certain services therein mentioned in one locality than another.[2]

Indiana provides that it shall be a good defense to any action growing out of any violation of the antitrust law of 1907, or any other act or common law relating to the subject matter of this act, if the defendant shall plead and by a fair preponderance of the evidence prove that such violation is not in restraint of trade or commerce, or does not restrict trade or commerce or limit or reduce the production or increase or reduce the price of merchandise or any commodity, natural or artificial, or prevent competition in manufacturing.[3]

North Carolina declares all contracts, combinations in the form of trust, and conspiracies in restraint of trade or commerce prohibited in sections 1 and 2 of chapter 41 of the Laws of 1913 to be unreasonable and illegal, unless the persons entering into such contract, etc., can show affirmatively upon an indictment or civil action for violation of said sections that such contract, etc., does not injure the business of any competitor, or prevent anyone from becoming a competitor because his or its business will be unfairly injured by reason of such contract, etc.[4]

California provides that in any indictment, etc., for any offense named in the antitrust act it shall be sufficient to state the purpose or effects of the trust or combination and that the accused is a member of, acted with or in pursuance of it, or aided or assisted in carrying out its purposes, without giving its name or description, or how, when, and where it was created.[5]

The laws of Louisiana, Michigan, Ohio, and North Dakota are substantially similar.[6]

Louisiana varies from the above by substituting "was" for "is" before the words "a member of," and omitting the words "or aided or assisted in carrying out its purposes" after the words "in pursuance of it."

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[1] Louisiana, Laws 1908, act 128, sec. 1.

[2] Mississippi, Code 1906, sec. 5002, as amended by Laws 1908, chap. 119, sec. 1.

[3] Indiana, Laws 1907, chap. 243, sec. 1.

[4] North Carolina, Laws 1913, chap. 41, sec. 3.

[5] California, Laws 1907, chap. 530, sec. 5.

[6] Louisiana, Laws 1892, act 90, sec. 5; Michigan, P. A. 1899, No. 255, sec. 5; Ohio, G. C., sec. 6398; North Dakota, Laws 1907, chap. 259, sec. 6.

North Dakota varies by omitting the words "or effects" after "purpose," by omitting the words "or aided or assisted in carrying out its purposes" after "in pursuance of (to) it," and by omitting the words "when and" and substituting "or" after the words "or how."

In this connection Missouri declares that it shall be sufficient to allege that any person or persons have created, entered into, become members of, or participated in any pool, trust, agreement, etc., without alleging the manner in which such pool, etc., has been effected, and it shall not be necessary to allege how, when, or where such pool, etc., was effected.[1]

Oklahoma provides that it shall be sufficient to prove that a trust, monopoly, etc., existed without the period not barred by the statute of limitations, and was continued in any form into and during any portion of the period not so barred, and that defendant belonged to it, or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article or agreement, or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all.[2]

Michigan provides that it shall be sufficient to prove that a trust or combination exists and that the defendant belonged to it, or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement, or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all.[3]

California, North Dakota, Ohio, and Utah have similar provisions.[4]

California substitutes the word "belonged" for belonging, reading, "without proving all the members belonged to it," etc.

North Dakota adds "and proof that any person has been acting as agent of any defendant in transacting the business of such defendant in this state, or, while agent of such defendant and in the name, behalf or interest of such defendant, violated any of the provisions of this chapter, shall constitute prima facie proof that the same was the act of such defendant."

Section 18. Penalties.

The penalties for violating State antitrust statutes are in many cases heavy. In addition to prison sentences up to 10 years, personal and corporate fines up to $25,000, and in a few instances prison sentences and fines without any fixed limits, separate penalties for each day the violation is continued, and increased penalties for second and subsequent offenses, there are provisions—

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[1] Missouri, R. S., chap. 98, sec. 10312, as amended in 1913.

[2] Oklahoma, act of June 10, 1908, sec. 14.

[3] Michigan, P. A. 1899, No. 255, sec. 6.

[4] California, Laws 1907, chap. 530, sec. 6; North Dakota, Comp. Laws 1913, Penal Code, sec. 9956; Ohio, G. C., sec. 6399; Utah, Comp. Laws, 1907, sec. 1762x5.

1. Prohibiting persons from dealing with or handling the goods of offenders; enabling persons to evade payment, or to recover the price paid for goods bought from parties transacting business in violation of the statutes; allowing injured parties to recover actual, double or treble damages; and otherwise encouraging prosecutions;[1]

2. Expressly declaring void all contracts made in violation of the statutes and requiring the forfeiture of charters by convicted corporations;

3. Penalizing the persons who act on behalf of corporations, as well as the corporations, for corporate infringements.

PERSONAL PENALTIES.—Provisions regarding fines, imprisonment, or both are found in the antitrust statutes of the following 35 States: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Wisconsin, and Wyoming.[2]

Both fine and imprisonment may be imposed for violations of at least some of the provisions in all but seven[3] of these States; but Arizona, Oklahoma, and Texas are the only States that make both punishments applicable in all cases. Kansas, New Mexico, and Ohio establish both penalties in some instances. Arizona, Oklahoma, and Texas are also the only States which establish penalties of imprisonment for all violations, but Massachusetts and Missouri, as well

[1] Special fees for prosecuting officers are frequently provided. Illinois gives the informer one-fifth of the fine recovered (Rev. St., 1913, Crim. Code, sec. 269j); and in North Carolina (Laws 1911, chap. 167, sec. 7½) "violation of any of the provisions of this act shall subject the offender to a penalty of one hundred dollars per day, which may be recovered for his own benefit by any citizen of the State."

[2] Alabama, Code, 1907, secs. 7579–7581; Arizona, Laws 1912, chap. 73, secs. 5, 6; Arkansas, Laws 1905, as amended in 1913 by Act 161, secs. 2, 3; California, Laws 1907, chap. 530, secs. 4, 7, 10, Laws 1913, chap. 276, sec. 5; Colorado, Laws 1913, chap. 161, secs. 3, 4, 5; Connecticut, Laws 1911, chap. 185; Idaho, Laws 1909, p. 297, secs. 2, 3, Laws 1911, chap. 161, secs. 1, 2, 4, 5, 7, 8; Illinois, Rev. Stats. 1913, Crim. Code, secs. 269c, 269d, 269h; Indiana, Stats. 1914, secs. 3866–3868, 3870, 3875, 3879, 3880, 3885, 3886, 3892b; Iowa, Stats., secs. 5062, 5065, 5066, Laws 1909, chap. 225, sec. 3; Kansas, Gen. Stats., secs. 5144–5147, 5159, 5165, 5177, 5179, 5182, 5184, 5187; Louisiana, Laws 1890, No. 86, secs. 2, 3, Laws 1892, No. 90, sec. 4, Laws 1908, No. 128, secs. 2, 6; Maine, Rev. Stats., chap. 47, sec. 55; Massachusetts, Laws 1907, chap. 469, sec. 2, Laws 1912, chap. 651, secs. 3, 4, 8; Michigan, Stats. 1913, secs. 2950–2966, 14887ff, Laws 1913, No. 135, secs. 2, 6; Minnesota, Gen. Stats. 1913, secs. 4487, 4488, 8973, 8974, 8980; Mississippi, Code 1906, secs. 5006, 5008, 5010, 5020, Laws 1910, chap. 222; Missouri, Rev. Stats., chap. 98 (as amended by Laws 1913, p. 549), secs. 10302, 10304, 10315, 10322; Montana, Laws 1909, chap. 97, sec. 1, Laws 1913, chaps. 7, 8, Laws 1915, chap. 69; Nebraska, Rev. Stats. 1913, secs. 4020, 4030, 4033–4035, 4045–4060, 8858, 8860; New Jersey, Laws 1913, chaps. 13 (secs. 2, 3, 4), 14, 15, 16, 19; New Mexico, Stats. 1915, secs. 1685, 1686; New York, Gen. Business Law, sec. 341 (as amended by Laws 1910), chap. 633; North Carolina, Laws 1911, chap. 167, secs. 6, 7, 8, Laws 1913, chap. 41, secs. 1, 5, 5f, 12; North Dakota, Comp. Laws 1913, secs. 3046, 3049, 9952, 9953; Ohio, Gen. Code, secs. 6390, 6395, Laws 1913, pp. 254, 405, 424, 425; Oklahoma, Laws 1908, p. 750, secs. 4, 6, 10, 11, Laws 1913, chap. 114; Oregon, Laws 1915, chap. 344; South Carolina, Civ. Code, 1912, secs. 2437, 2438, 2441, 2448, 2452; South Dakota, Laws 1909, chap. 224, secs. 6, 9, 10; Tennessee, Laws 1903, chap. 140, secs. 2, 3, Laws 1907, chap. 360; Texas, Rev. Civ. Stats., art. 7806, Rev. Crim. Stats., arts. 1458, 1464, 1466, 1470, 1471; Utah, Stats., secs. 1755, 1756, 1758, 1760, Laws 1913, chaps. 12, 41; Wisconsin, Stats. 1913, 1747e, 1770g, 1791j, 1791n-9, 1791n-10; Wyoming, Laws 1911, chap. 62, sec. 4, Laws 1915, chap. 23.

[3] Either fine or imprisonment may be imposed in Colorado and Minnesota. In Alabama, Arkansas, Maine, Mississippi, and South Dakota fine only is provided.

as Kansas, New Mexico, and Ohio, also provide prison sentences for some violations.

The maximum penalties applicable are usually specified in the laws and run as high as 10-year prison terms [1] and $25,000 fines.[2] A majority of the States listed also fix a minimum below which the penalties must not fall. A few statutes, however, prescribe no limits for the penalties.[3] Additional penalties for each day violations continue are provided by statutes in Arizona, Arkansas, California, Indiana, Kansas, Minnesota, Mississippi, Montana, Nebraska, Ohio, Oklahoma, South Carolina, and Texas; and in all of these States except Arizona, Indiana, and Texas each day's violation of at least some provisions is made a separate offense. Each week's violation is made a separate offense in North Carolina.

Increased penalties for second and subsequent offenses are prescribed in Illinois, South Dakota, and Utah.

Individuals who act for corporations as well as those acting on their own behalf in violation of the statutes are made liable to individual penalties distinct from the corporate fines and forfeitures, in all States that prescribe penalties except Maine.

CORPORATE FINES.—The fines referred to above are applicable to corporations as well as to persons who violate the provisions of the antitrust statutes in all the States listed above (see p. 212, footnote 2) except in Connecticut, New Mexico, and Tennessee.

FORFEITURE OF CHARTER OR RIGHT TO DO BUSINESS.—Florida [4] and all of the 35 States listed above (see p. 212, footnote 2) except Alabama, Connecticut, Maine, New Mexico, New York, and North Carolina also provide for forfeiture of charter or franchise, or revocation of the right to do business as one of the penalties for violation of their antitrust statutes.

CONTRACTS VOID.—Many States (Arizona, California, Colorado, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, New York, North Dakota, South Carolina, Tennessee, Texas, and Utah) expressly provide that contracts or agreements in violation of the antitrust laws shall be void.[5]

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[1] In Oklahoma, South Carolina, Tennessee, and Texas.

[2] In Montana.

[3] North Carolina prescribes no limits in its act of 1913, and the Wyoming law of 1911 fixes no maximum. Minima are frequently omitted.

[4] Florida, Comp. Laws, 1914, sec. 3161.

[5] Arizona, Laws 1912, chap. 73, sec. 8; California, Laws 1907, chap. 530, sec. 8; Colorado, Laws 1913, chap. 161, sec. 6; Illinois, Act June 11, 1891, sec. 5; Indiana, Stats., secs. 3878, 3884, 3889, 3892c; Iowa, Stats., sec. 5063; Kansas, G. S., 5148; Louisiana, Laws 1892, act 90, sec. 7, Laws, 1908, act 128, sec. 3; Massachusetts, Act of June 1, 1907, sec. 2, Laws 1912, chap. 651, sec. 5; Michigan, P. A. 1899, No. 255, sec. 8, P. A. 1905, No. 229, sec. 2, P. A. 1913, No. 135, sec. 3; Minnesota, Stats. 1913, sec. 8981; Mississippi, Code, 1906, sec. 5003; Missouri, R. S., chap. 98, as amended in 1913, sec. 10316; Nebraska, R. S., 1913, sec. 4031; New Mexico, Stats. 1915, sec. 1687; New York, Consol. Laws, Gen. Bus. Law, sec. 340; North Dakota, Laws 1907, chap. 259, sec. 8, chap. 260, sec. 3; South Carolina, Civ. Code 1912, sec. 2445; Tennessee, Laws 1903, chap. 140, sec. 1; Texas, Rev. Civ. Stats., 1911, art. 1465; Utah, Stats., sec. 1757.

In Idaho, Louisiana, Nebraska, Maine, and Wisconsin every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, within the State is declared illegal.[1]

Maine provides that no certificate of stock, or other evidence of interest, in any trust, combination, or association shall have legal recognition in any court in the State, and any deed of real estate given by any person, firm, or corporation for the purpose of becoming interested in such trust, etc., or any mortgage given by the latter to the seller, as well as all certificates growing out of such transaction, shall be void.[2]

In South Carolina it is provided that when a foreign corporation is found guilty of a violation of the law the "effect of the judgment of the Court shall be to deny to such corporation the recognition of its corporate existence in any Court of law or equity in this State. But nothing in this Section shall be construed to affect any right of action then existing against such corporation." [3]

NO RECOVERY FOR GOODS, ETC.—Four States (Illinois, Missouri, New Mexico, and North Dakota) expressly provide that a purchaser is not liable for goods, etc., bought from any individual, corporation, etc., transacting business contrary to the antitrust law.[4]

Colorado provides that any contract or agreement in violation of any of the provisions of the antitrust act shall be absolutely void and not enforceable in any of the courts of the State; and when any civil action shall be commenced in any court of the State it shall be lawful to plead in defense thereof that the cause of action sued upon grew out of a contract or agreement in violation of the provisions of the act.[5] Kansas also has a similar provision in force.[6]

Mississippi prohibits persons, corporations, etc., (*a*) from combining to prevent by pooling any of such persons, corporations, etc., from separately bidding for the performance of a public work, and (*b*) from preventing by persuasion or reward any other person, corporation, etc., from bidding for the performance of such public work; and provides that all money to be paid on any such contract, when such provision has been violated, shall not be collectible, nor shall the same be paid.[7]

RECOVERY OF CONSIDERATION.—Kansas, Indiana, South Carolina, and Tennessee provide that any person or corporation injured or damaged by any arrangement, contract, agreement, trust, or com-

[1] Idaho, Laws 1911, chap. 215, p. 688; Louisiana, Laws 1890, Act 86, sec. 1; Nebraska, Laws 1905, chap. 162, sec. 1; Maine, Laws 1913, chap. 106, sec. 1; Wisconsin, Stats. 1913, sec. 1747e.

[2] Maine, R. S., chap. 47, sec. 54.

[3] South Carolina, Civ. Code, 1912, sec. 2438.

[4] Illinois, Act June 11, 1891, sec. 6; Missouri, R. S., chap. 98, as amended in 1913, sec. 10307; New Mexico, Stats. 1915, sec. 1687; North Dakota, Laws 1907, chap. 259, sec. 9.

[5] Colorado, Laws 1913, chap. 161, sec. 6.

[6] Kansas, G. S., secs. 5148, 5189.

[7] Mississippi, Code 1906, secs. 5008, 5009.

bination, such as described in their antitrust acts, may recover of any person or corporation operating such trust, etc., the full consideration or sum paid by him or them for goods, etc., the sale of which is controlled by such combination or trust.[1]

Indiana provides that if there shall be collusion or fraud among bidders for any contract or work, as described in section 3 of the Antitrust Law of 1907, the principal who lets the contract or work, or for whom the contract was let, shall not be liable for such letting, or on account of work done, etc., to the successful bidder, his successors or assigns, if such bidder is a party to the collusion or fraud; and if, before notice of such collusion or fraud, payment or partial payment shall have been made, such principal may within five years from the date of last payment recover the full amount of such payments with interest and attorney's fees against such successful bidder.[2]

PROHIBITIONS AGAINST DEALING IN OR HANDLING GOODS OF CONVICTED PARTIES.—The antitrust law of Texas provides that when a corporation shall have had its charter, franchise, or its right to do business forfeited for a violation of the act, no other corporation to which the defaulting corporation may have transferred its properties and business, or which has assumed the payment of its obligations, shall be permitted to incorporate or do business in Texas.[3]

Missouri, in substance, provides that it shall be unlawful for any person, corporation, or association of persons to deal in or offer for sale in the State any article or thing, or policy of property insurance, made, produced, manufactured, or dealt in by any corporation whose rights, franchises, or privileges have been declared forfeited. These provisions are also made applicable in all respects to the successors or assigns of any such corporations.[4]

Nebraska, in connection with the enforcement of its law against rebates, provides that if any joint-stock company, corporation, or combination, or any agent thereof, shall solicit, accept, or receive any such rebate, concession, or service as is declared to be unlawful, it shall be unlawful thereafter to transport within the State any article owned or controlled by such company, corporation, or combination, or produced or manufactured by it, by whomsoever the same may be owned or controlled. The same prohibition applies if any such joint-stock company, corporation, or combination, shall offer, grant, or give any special prices, inducements, or advantages for the sale of articles produced, manufactured, owned, or controlled by it to purchasers in any particular locality in order to restrict or destroy competition. The above prohibition shall not apply

[1] Kansas, Laws 1889, chap. 257, sec. 3; G. S., sec. 5188; Indiana, Stats., sec. 3882; South Carolina, Civ. Code, sec. 2439; Tennessee, Laws 1903, chap. 140, sec. 4.

[2] Indiana, Antitrust Law, 1907, sec. 4.

[3] Texas, G. L. 1903, Chap. XCIV, secs. 7, 10.

[4] Missouri, R. S., chap. 98, as amended in 1913, sec. 10308.

to an article purchased bona fide before the decree is made, nor even after decree is made, to an article purchased bona fide, without notice, and within 30 days after entry of decree. The transportation company and its officers, etc., are subject to a fine of not less than $5,000 if knowingly concerned in the transportation of such articles.[1]

In Arizona and Kansas persons, corporations, etc., their officers, representatives, or consignees, violating the antitrust act are denied the right to do business in the State, and all persons, corporations, etc., their officers, representatives, and consignees within the State, are prohibited from handling the goods of or dealing with any such person, corporation, etc.,[2] their officers, representatives or consignees.

DAMAGES.—The laws of a number of States (Alabama, Arizona, Colorado, Iowa, Kansas, Michigan, Mississippi, New Mexico, and Wisconsin)[3] expressly provide for the recovery of actual damages by parties injured by any prohibited agreement, combination, etc. In addition to actual damages, Alabama and Mississippi allow the sum of $500, and Kansas allows reasonable attorney's fees to be fixed by the court and taxed as part of the costs.

DOUBLE DAMAGES.—California and Michigan provide for the recovery of double damages and costs of suit.[4]

TREBLE DAMAGES.—Maine,[5] North Carolina,[6] and Utah[7] permit the recovery of treble damages. Idaho, Indiana, Kansas, Missouri, Nebraska, and Oklahoma permit the recovery of treble damages, costs, and reasonable attorney's fees.[8]

Section 19. Stock watering.

CONSTITUTIONAL PROVISIONS.—The constitutions of 24 States (Alabama, Arizona, Arkansas, California, Colorado, Delaware, Idaho, Illinois, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, Washington) contain provisions relating to the issuance of corporate stock, the majority of such States providing that all fictitious increases of stock or indebtedness shall be void.

The constitution of New Hampshire (art. 82) declares that "the size and functions of all corporations should be so limited and regu-

[1] Nebraska, R. S. 1913, sec. 4059.

[2] Arizona, Laws 1912, chap. 73, sec. 5; Kansas, Laws 1897, chap. 265, sec. 5.

[3] Alabama, Stats., sec. 2487; Arizona, Laws 1912, chap. 73, sec. 9; Colorado, Laws 1913, chap. 161, sec. 7; Iowa, Laws 1909, chap. 225, sec. 2; Kansas, G. S., secs. 5149, 5183; Michigan, P. A. 1905, No. 229, sec. 6; Mississippi, Code 1906, sec. 5007, as amended by Laws 1912, chap. 250; New Mexico, Stats., 1915, sec. 1687; Wisconsin, Stats., 1913, sec. 1747e.

[4] California, Laws 1907, chap. 530, sec. 11; Michigan, P. A. 1899, No. 255, sec. 11.

[5] Maine, Laws 1913, chap. 106, sec. 4.

[6] North Carolina, Laws 1913, chap. 41, sec. 14.

[7] Utah, Stats., sec. 1761.

[8] Idaho, Laws 1911, chap. 215, p. 688, sec. 14; Indiana, Laws 1907, chap. 243, sec. 7; Kansas, Laws 1899, chap. 293, sec. 5; Missouri, R. S., chap. 98, sec. 10305, as amended 1913; Nebraska, R. S., 1913, sec. 4062; Oklahoma, Laws 1908, p. 750, sec. 3, Laws 1913, chap. 114, sec. 6.

lated as to prohibit fictitious capitalization" and grants to the general court the power to enact laws to prevent the same.

The constitution of Alabama provides that "no corporation shall issue stock or bonds except for money, labor done, or property actually received; and all fictitious increase of stock or indebtedness shall be void. The stock and bonded indebtedness of corporations shall not be increased except in pursuance of general laws, nor without the consent of the persons holding the larger amount in value of stock first obtained at a meeting to be held after 30 days' notice, given in pursuance of law."[1]

With the changes indicated, this provision has been adopted in certain States as follows:

Arkansas, California, and Missouri require 60 days' notice.[2]

Arkansas expressly limits the provision to private corporations.[3]

Colorado, Idaho, and Montana include services performed, omit reference to increase of bonded indebtedness, and "majority" is used instead of "larger amount in value."[4]

Louisiana has fictitious "issues" instead of "increase," and adds the following: "Any corporation issuing such fictitious stock shall forfeit its charter." It also omits reference to increase of bonded indebtedness, but prohibits unauthorized decrease as well as increase of stock.[5]

Missouri has "money paid" instead of "money."[6]

North and South Dakota and Pennsylvania have the phrase "money or property actually received" instead of "property actually received," omit "bonded" before "indebtedness," and require 60 days' notice instead of 30.[7]

Oklahoma omits the word "bonds" and adds after the words "actually received" the words "to the amount of the par value thereof;" and after the words "shall be void," the words "and the Legislature shall prescribe the necessary regulations to prevent the issue of fictitious stock or indebtedness."[8]

South Carolina requires "money or property actually received or subscribed," and South Carolina and Texas omit the reference to increase of stock or bonded indebtedness.[9]

Utah provides that corporations shall not issue stock except to bona fide subscribers thereof or their assignees, nor shall any corpora-

[1] Alabama, Constitution, sec. 234.

[2] Arkansas, Constitution, Art. XII, sec. 8; California, Constitution, Art. XII, sec. 11; Missouri, Constitution, Art. XII, sec. 8.

[3] Arkansas, Constitution, Art. XII, sec. 8.

[4] Colorado, Constitution, Art. XV, sec. 9; Idaho, Constitution, Art. XI, sec. 9; Montana, Constitution, Art. XV, sec. 10.

[5] Louisiana, Constitution, arts. 266, 267.

[6] Missouri, Constitution, Art. XII, sec. 8.

[7] North Dakota, Constitution, Art. VII, sec. 138; South Dakota, Constitution, Art. XVII, sec. 8; Pennsylvania, Constitution, Art. XVI, sec. 7.

[8] Oklahoma, Constitution, Art. IX, sec. 39.

[9] South Carolina, Constitution, Art. IX, sec. 10; Texas, Constitution, Art. XII, sec. 6.

tion issue any bond or other obligation for the payment of money except for money or property received or labor done. It omits reference to increase of bonded indebtedness or to number of days' notice, the sentence reading: "The stock of corporations shall not be increased except in pursuance of general law, nor shall any law authorize the increase of stock without the consent of the person or persons holding the larger amount in value of the stock, or without due notice of the proposed increase having previously been given in such manner as may be prescribed by law." The constitutions of Arizona and Washington contain provisions similar to that adopted in Utah.[1]

While the above are the more usual forms of constitutional provisions relating to this subject, others have been adopted, as indicated below.

The constitution of Kentucky provides that "No corporation shall issue stocks or bonds except for an equivalent in money paid or labor done, or property actually received and applied to the purposes for which such corporation was created, and neither labor nor property shall be received in payment of stock or bonds at a greater value than the market price at the time such labor was done or property delivered, and all fictitious increase of stock or indebtedness shall be void."[2]

The Nebraska constitution provides that "No railroad corporation shall issue any stock or bonds, except for money, labor or property actually received and applied to the purposes for which such corporation was created; and all stock, dividends, and other fictitious increase of capital stock or indebtedness of any such corporation shall be void. The capital stock of railroad corporations shall not be increased for any purpose, except after public notice for sixty days, in such manner as may be provided by law."[3]

Illinois has constitutional provisions similar to Nebraska, there being minor differences in the wording and no comma is used between the words "stock" and "dividends," as in Nebraska.[4]

The constitution of Delaware declares that "No corporation shall issue stock, except for money paid, labor done or personal property, or real estate or leases thereof actually acquired by such corporation; and neither labor nor property shall be received in payment of stock at a greater price than the actual value at the time the said labor was done or property delivered, or title acquired."[5]

The constitution of Virginia provides that "The General Assembly shall enact general laws regulating and controlling all issues of stock

[1] Utah, Constitution, Art. XII, sec. 5; Arizona, Constitution, Art. XIV, sec. 6; Washington, Constitution, Art. XII, sec. 6.

[2] Kentucky, Constitution, sec. 193.

[3] Nebraska, Constitution, Art. XI, sec. 5.

[4] Illinois, Constitution, Art. XI, sec. 13.

[5] Delaware, Constitution, Art. IX, sec. 3.

and bonds by corporations. Whenever stock or bonds are to be issued by a corporation, it shall, before issuing the same, file with the State Corporation Commission a statement (verified by the oath of the president or secretary of the corporation, and in such form as may be prescribed or permitted by the commission) setting forth fully and accurately the basis, or financial plan, upon which such stock or bonds are to be issued; and where such basis or plan includes services or property (other than money), received or to be received by the company, such statement shall accurately specify and describe, in the manner prescribed, or permitted, by the commission, the services and property, together with the valuation at which the same are received or to be received; and such corporation shall comply with any other requirements or restrictions which may be imposed by law. * * *"[1]

The Mississippi constitution provides that "No transportation corporation shall issue stocks or bonds except for money, labor done (or in good faith agreed to be done), or money or property actually received; and all fictitious increase of stock or indebtedness shall be void." [2]

STATUTORY PROVISIONS.—Nearly all the States have statutory provisions intended to prevent the issuance of watered stock.

For what stock may be issued.—The statutes of 11 States [3] (Connecticut, Michigan, New Hampshire, New Mexico, Oregon, Rhode Island, South Dakota, Tennessee, Utah, West Virginia, and Wyoming), Porto Rico [4] and the District of Columbia [5] provide that capital stock, etc., shall be issued for money or property. Iowa provides that it may be issued for money, property, or "other thing." [6]

It is provided in 17 States [7] (Arizona, California, Delaware, Illinois, Indiana, Kentucky, Minnesota, Missouri, Montana, Nevada, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, Texas, and Wisconsin) and Alaska [8] that capital stock, etc., may be issued for money, labor, or property. Delaware and Nevada provide that prop-

[1] Virginia, Constitution, Art. XII, sec 167.

[2] Mississippi, Constitution, sec. 196.

[3] Connecticut, P. A. 1903, chap. 194, sec. 12; Michigan, Howell's Stats., sec. 9533; New Hampshire, Laws 1911, chap. 164, sec. 14 (e); New Mexico, Laws 1905, chap. 79, secs. 54, 55; Lord's Oregon Laws, sec. 6696; Rhode Island, G. L. 1909, chap. 214, sec. 8; South Dakota, Laws 1913, chap. 145, sec. 8; Tennessee, Code, 1896, secs. 2306, 2351, 2335; Utah, Comp. Laws, 1907, sec. 316; West Virginia, Code, chap. 53, sec. 24; Wyoming, Laws 1907, chap. 70, sec. 8.

[4] Porto Rico, Rev. Stats., sec. 424.

[5] District of Columbia, Code, sec. 613.

[6] Laws, 1907, chap. 71.

[7] Arizona, Laws 1912, chap. 90, sec. 52 (b); California, Civil Code, 1910, supp., sec. 359; Delaware, Laws, 1903, chap. 394, sec. 14, as amended, 23 Del. Laws, chap. 155; Illinois, Laws 1913, p. 471; Indiana, Laws 1913, chap. 76, sec. 89; Kentucky, Carroll, 1915 Stats., sec. 568; Minnesota, 1915 Stats., secs. 6187, 6233; Missouri, Annotated Stats., 1909, sec. 2981, and Laws 1913, pp. 594, 612, 631; Montana, Civil Code, 1907, sec. 3894, Nevada, Laws 1903, chap. 88, sec. 54; New Jersey, Laws 1913, chap. 15; New York Stock Corp. Law, sec. 55; North Dakota, Comp. Laws, 1913, sec. 4528; Pennsylvania, Act of 1874, sec. 17, as amended, Laws 1876; p. 32, Act 1874, sec. 18, and Laws 1913, No. 854, Art. III, sec. 4; South Carolina, Code, 1912, secs. 2799, 2836. Texas, Rev. Civil Stats., 1911, arts. 1145, 1146; Wisconsin, Stats. 1913, secs. 1753–1, 1753–7.

[8] Alaska, Comp. Laws, 913, sec. 811.

erty shall consist of real or personal property and leases, while in Pennsylvania it may be real or personal, mineral rights, patent rights, and "other property." In Arizona, Illinois, and Indiana this provision applies only to public-service corporations. In New York this provision does not apply to investment, safe deposit, trust, and personal loan companies and banks. These are required to pay all their capital stock in cash.[1]

Maine, Maryland, Kansas, and the District of Columbia provide that stock may be issued for money, services, or property,[2] but Kansas adds "other consideration." In Kansas and the District of Columbia this provision applies only to public-service corporations. Maryland public-service corporations may issue stock for earnings expended prior to April 1, 1914, for certain purposes, if application for authorization by the public-service commission be made on or before April 1, 1915.[3]

In five States[4] (Alabama, Colorado, Florida, Idaho, and North Carolina) capital stock may be issued for money, labor, services, or property.

It is provided in Vermont that stock may be issued for cash, real or personal property, rights or franchises;[5] in Massachusetts, for cash, property, tangible or intangible, services or expenses, except that gas and electric companies are limited to cash, real and personal property, and, where a company is organized to take over a bankrupt or insolvent company, to the claims against the insolvent company;[6] in Virginia, for money, land or other property real or personal, leases, options, mines, minerals, mineral rights, patent rights, rights of way, or other rights or easements, contracts, labor or services;[7] and in Ohio, by public-service corporations, for money, property, consideration, or labor.[8]

Three States (Mississippi, Oklahoma, and Washington) that have some provisions against stock watering fail to specify for what capital stock may be issued.

Control of valuation.—The statutes of a majority of the States designate who shall determine the valuation of property, labor, services, etc., for which stock is issued.

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[1] New York, Laws 1914, chap. 369, secs. 103, 183, 291, 316, 341.

[2] Maine, R. S., chap. 47, sec. 50; Maryland, Laws 1908, p. 38, sec. 35; Kansas, Laws 1911, chap. 238, sec. 25; District of Columbia, U. S. Stats., vol. 37, p. 990.

[3] Maryland, Laws 1914, chap. 445, pp. 720 and 721.

[4] Alabama, Civil Code, 1907, sec. 3467; Colorado, Stats., 1914, sec. 863; Florida, Comp. Laws 1914, sec. 2653; Idaho, Laws 1909, p. 160, sec. 6; North Carolina, Revisal 1908, chap. 21, sec. 1172.

[5] Vermont, Laws 1910, No. 143, sec. 6.

[6] Massachusetts, Business Corp. Law, 1903, as amended, sec. 14, Laws 1914, chap. 742, secs. 36, 49.

[7] Virginia, Corp. Act, 1903, chap. 5, sec. 9.

[8] Ohio, Gen. Code, sec. 614-53, as amended by Laws 1913, pp. 841 and Code sec. 614-55, added by Laws 1911, p. 566.

Twenty-two States[1] (Arizona, California, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New York, New Jersey, Ohio, Oregon, Pennsylvania, Rhode Island, and Wisconsin) and the District of Columbia[2] require either that the valuation of property for which stock is issued shall be passed on by some designated commission or public official or that the approval of such commission or official shall be had prior to the issuance of stock. In Arizona, California, Colorado, Georgia, Illinois, Indiana, Kansas, Maine, Maryland, Michigan, Missouri, New Hampshire, New Jersey, Ohio, Pennsylvania, Wisconsin, and the District of Columbia this requirement is confined to public-utilities companies, and in New York to public utility and moneyed corporations, but in the case of reductions of capital stock all corporations in New York are required to get such approval. Of these States, Illinois, Indiana, Missouri, and Wisconsin authorize the commission to make a valuation of the property before stock shall be issued. Arizona, California, Colorado, Georgia, Kansas, Maine, Maryland, Michigan, and New Jersey require the approval of the public-service commission before stock is issued, and authorize the commission to make inquiry to satisfy itself as to the valuation of the property. New York, New Hampshire, and Minnesota require the approval of the proper commission before issuing stock. In the latter State, however, this applies only to railroad corporations. Ohio authorizes the valuation of property by the commission for any purpose required by law, and this State, together with the District of Columbia, requires the approval of the commission before stock is issued. Pennsylvania requires public-service companies either to apply to the commission for a certificate of valuation of property for which stock is to be issued or to file with the commission a certificate of notification of such issuance containing detailed information required by law. In Massachusetts the requirement for approval of the issuance of stock or valuation of property applies to business corporations, gas and electric companies and certain classes of railroad corporations, the first being subject to the commissioner of corporations, the second to the board of gas and electric light commissioners, and the third to the public-utilities

[1] Arizona, Laws 1912, chap. 90, sec. 52; California, Laws 1911, first extra sess., chap. 14, sec. 52; Colorado, Laws 1913, chap. 127, sec. 37; Georgia, Code, 1914, sec. 2665; Illinois, Laws 1913, P. Util. Com. Act, sec. 21, p. 470; Indiana, Laws 1913, chap. 76, sec. 89; Iowa, 32 G. A., chap. 71, sec. 1; Kansas, Laws 1911, chap. 238, sec. 25; Maine, Laws 1913, chap. 216; Maryland, Laws 1910, chap. 180, secs. 27, 34, 41, 42, Laws 1914, chap. 445, pp. 720–721; Massachusetts, Bus. Corp. Law, 1903, as amended, sec. 14, Laws 1913, chap. 784, secs. 14, 15, 16, Laws 1914, chap. 742, secs. 36, 39, 49, 168; Michigan, Howell's Stats., sec. 9610; Minnesota, 1915 Stats., sec. 6187; Missouri, Laws 1913, pp. 594, 612, 631; New Hampshire, Laws 1911, chap. 164, sec. 14; New York, Stock Corp. Laws, sec. 64, as amended by Laws 1913, chap. 305, Pub. Serv. Com. Law, secs. 55, 69 and sec. 101, added by Laws 1910, chap. 673; New Jersey, Laws 1911, chap. 195, sec. 18 (c); Ohio, Gen. Code, sec. 499–8 to 11 and sec. 614–53, as amended by Laws 1913, pp. 807, 841; Oregon, Laws 1913, chap. 341, secs. 15, 22; Pennsylvania, Laws 1913, No. 854, p. 1389; Rhode Island, G. L. 1909, chap. 214, sec. 8; Wisconsin, Stats., 1913, sec. 1753–1 to 22.

[2] U. S. Stats., vol. 37, p. 990

commission. In Rhode Island the requirement applies to manufacturing companies, and in Oregon to investment companies. In Iowa the provision applies to all classes of corporations except building and loan associations.

Virginia provides that a statement shall be filed with the State corporation commission, which statement shall contain such description of the property, labor, etc., as may be required by the said commission and the valuation put upon said property, etc. This statement has to be filed before the stock may issue, but the judgment of the directors as to the value of the property, etc., is conclusive in the absence of fraud.[1]

Utah requires the affidavit of three persons familiar with the property, except in case of corporations organized for mining and irrigation purposes.[2]

In 12 States [3] (Connecticut, Delaware, Idaho, Maine, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, South Dakota, and Wyoming) the decision of the directors controls; but, in Maine and New Jersey, public-service corporations, in New York, public-service and moneyed corporations, and, in Oregon, investment companies, are required to obtain the permission of the proper commission before the issuance of stock.

In Florida, West Virginia, and Michigan the directors or stockholders determine the valuation.[4] This provision does not apply to public utilities in Michigan.

Maryland provides that the stockholders shall determine the valuation, while in South Carolina and Vermont it is determined by the incorporators. In the latter State, however, after incorporation the valuation rests with the stockholders.[5]

In North Dakota the officers of the corporation apparently pass on the valuation.[6]

Thirteen States (California, Colorado, Kansas, Kentucky, Mississippi, Missouri, Montana, Oklahoma, Pennsylvania, Tennessee, Texas, Washington, and Wisconsin), having some limitations on stockwatering, have no specific provisions as to valuation. In three of these (Missouri, Pennsylvania, and Wisconsin), however, the valuation of

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[1] Virginia, Corp. Act, 1903, chap. 5, sec. 9.

[2] Utah, Comp. Laws, 1907, sec. 316.

[3] Connecticut, P. A. 1903, chap. 194, sec. 12; Delaware, Laws 1903, chap. 394, sec. 14, as amended by 23 Del. Laws, chap. 155; Idaho, Laws 1909, p. 164, sec. 10; Maine, R. S., chap. 47, sec. 50, Laws 1913, chap. 216; Nevada, Laws 1903, chap. 88, sec. 54; New Jersey, Laws 1913, chap. 15; New Mexico, Laws 1905, chap. 79, sec. 55; New York, Stock Corp. Law, sec. 55; North Carolina, Revisal 1908, chap. 21, sec. 1172; Lord's Oregon Laws, sec. 6696; South Dakota, Laws 1907, chap. 104, sec. 4; Wyoming, Laws 1907, chap. 70, sec. 8.

[4] Florida, Comp. Laws 1914, sec. 2653; West Virginia, Code, chap. 53, sec. 24; Michigan, Howell's Stats., secs. 9533, 9545.

[5] Maryland, Laws 1908, p. 38, sec. 35; South Carolina, Code, 1912, sec. 2836; Vermont, Laws 1910, No. 143, sec. 6.

[6] North Dakota, Comp. Laws 1913, secs. 4527, 4528.

property taken by public-service companies is under the control of a State commission.[1]

Fictitious increases void.—Eleven States[2] (Arizona, California, Colorado, Kentucky, Minnesota, Missouri, Montana, Pennsylvania, South Carolina, Texas, and Wisconsin) provide that fictitious increases of stock shall be void. In Texas it is provided "that all fictitious dividends and other fictitious increase of the capital stock or indebtedness of any such corporation shall be void." The New Jersey law reads "no fictitious stock shall be issued."[3] In Iowa, stock issued in violation of law by any corporation organized for pecuniary profit is declared to be void.[4]

Provisions for enforcement.—A number of States punish as crimes the fraudulent or unlawful issuance of corporate securities, or the filing of false affidavits regarding the valuation of property for which stock is issued. In some States the officers or directors are made personally liable in cases of overvaluation of property. Several States provide for the dissolution of the corporation issuing stock in violation of law, or for the forfeiture of its charter or right to do business. Other States require a description of the property against which stock is issued to be filed for the inspection of the public or interested parties.

Twenty States[5] (Arizona, California, Colorado, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Washington, and Wyoming) and the District of Columbia[6] punish parties who make false statements in regard to the affairs of corporations. In several of these the penalty applies specifically to statements regarding the value of property, etc., for which stock is issued, while in others the wording of the law is general, covering any false statement. The penalty in most cases is fine or imprisonment. Arizona, California, Illinois, and Utah, however, provide for imprisonment only. Maryland, New Jersey, and Tennessee punish violations of this class as

[1] Missouri, Laws 1913, pp. 594, 612, 631; Pennsylvania, Laws 1913, No. 354, p. 1389; Wisconsin, Stats., 1913 sec. 1753–1 to 22.

[2] Arizona, Laws 1912, gen. sess., chap. 49, sec. 10, as amended in Laws 1912, spec. sess., chap. 65, sec. 1; California, Civil Code, 1910, supp., sec. 359; Colorado, Stats., 1914, sec. 863; Kentucky, Carroll, 1915, Stats., sec. 568; Minnesota, 1915 Stats., sec. 6233; Missouri, Annotated Stats., 1909, sec. 2981; Montana, Civil Code, 1907, sec. 3894; Pennsylvania, act 1874, sec. 17, as amended by Laws 1876, p. 32; South Carolina, Code, 1912, sec. 2799; Texas, Rev. Civil Stats. 1911, art. 6470; Wisconsin, Stats., 1913, sec. 1753.

[3] New Jersey, Laws 1913, chap. 15.

[4] Iowa, 33 G. A., chap. 104, sec. 4.

[5] Arizona, Penal Code, sec. 543; California, Penal Code, sec. 558; Colorado, Laws 1913, chap. 127, sec. 37(f); Illinois, Laws 1913, Pub. Util. Comm. Act, sec. 25, p. 473; Iowa, 32 G. A., chap. 71, sec. 5, and chap. 72; Maine, Laws 1913, chap. 129, sec. 66; Maryland, Laws 1908, p. 39, sec. 36; Massachusetts, Laws 1914, chap. 661; Minnesota, 1915 Stats., sec. 8917; Missouri, Laws 1913, Pub. Serv. Comm. Act, sec. 59–4, 77–4, 100–4; Nevada, Laws 1907, chap. 60, sec. 1; New Jersey, Laws 1913, chap. 15; New York, Penal Law, secs. 951, 952; Ohio, Gen. Code, sec. 614–57; Oregon, Laws 1913, chap. 341, sec. 23; Pennsylvania, Laws 1913, No. 854, sec. 37, p. 1430; Tennessee, Code, 1896, sec. 2067; Utah, Penal Code, sec. 4409; Washington, Remington & Ballinger Code, sec. 2639; Wyoming, Laws 1909, chap. 162, sec. 1.

[6] U. S. Stats., vol. 37, p. 991.

misdemeanors. In Colorado when made before the public utilities commission, they are punished as felonies.

Michigan and Minnesota provide that any person who shall fraudulently issue any stock, etc., or sell or offer for sale said stock, etc., shall be guilty of a felony.[1]

The statutes of 15 States [2] (Arizona, California, Colorado, Georgia, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Missouri, Ohio, Wisconsin, Pennsylvania) and the District of Columbia[3] which require the approval of the public-service commissions before stock shall be issued for property, etc., provide for the punishment of violations of said acts.

Connecticut provides that the directors concurring in the valuation of property, etc., for which stock is issued, shall, in case of fraud in the over-valuation, be jointly and severally liable to the corporation for the difference between the actual value and the value for which the stock is issued.[4]

Massachusetts makes the president, treasurer, and directors of certain corporations jointly and severally liable for actual damages if they assent to an unlawful issue of stock.[5] North Dakota has a similar provision, except that it applies to officers and all corporations and the liability is the difference between the actual cash value of the property, etc., and the par value of the stock issued.[6] Massachusetts also provides that if a foreign corporation which controls a majority of the capital stock of a domestic gas or electric company issues stock, etc., not authorized by the law of the State, based upon or secured by stock, etc., of such domestic corporation, the supreme judicial court shall have jurisdiction in equity to dissolve the domestic corporation.[7]

Iowa provides that any officer, agent, or representative who violates any provisions of the act in regard to the issuance of stock, etc., of a corporation for pecuniary profit may be fined and imprisoned.[8]

Minnesota provides that any officer of a railroad corporation who shall issue, sell, pledge, or dispose of any shares or certificates of shares of capital stock contrary to the law shall be guilty of a felony,[9] and Texas provides that any officer or director of a railroad company who

[1] Michigan, Howell's Stats., sec. 14872; Minnesota, 1915 Stats., sec. 6452.

[2] Arizona, Laws 1912, chap. 90, sec. 52; California, Laws 1911, first extra sess., chap. 14, sec. 52; Colorado, Laws 1913, p. 485, sec. 37 (e); Georgia, Code, 1911, secs. 2667, 2668; Illinois, Laws 1913, Pub. Util. Com. Act, secs. 24, 25; Indiana, Laws 1913, chap. 76, sec. 118; Kansas, Laws 1911, chap. 238, sec. 26; Maine, Laws 1913, chap. 129, secs. 66, 67; Maryland, Laws 1910, chap. 180, sec. 28; Massachusetts, Laws 1913, chap. 784, sec. 16, Laws 1914, chap. 742, secs. 37, 42; Michigan, Howell's Stats., sec. 9612; Missouri, Laws 1913, Pub. Serv. Com. Act, secs. 59–3, 77–3, 100–3; Ohio, Laws 1911, pp. 567, 509, 570; Wisconsin, Stats., 1913, sec. 1753–17; Pennsylvania, Laws 1913, No. 854, art. 6, sec. 37.

[3] U. S. Stats., vol. 37, pp. 990–991.

[4] Connecticut, P. A. 1903, chap. 194, sec. 12.

[5] Massachusetts, Business Corp. Law, 1903, sec. 14.

[6] North Dakota, Rev. Code, 1905, sec. 4195.

[7] Massachusetts, Laws 1914, chap. 742, sec. 172.

[8] Iowa, 32 G. A., chap. 71, sec. 5.

[9] Minnesota, Gen. Stats. 1913, sec. 6233.

shall violate the law regarding the issuance of stock, etc., shall be personally liable to the stockholders and creditors for the full par value of the illegal stock or full amount of fictitious dividends, etc., as the case may be.[1]

Three States [2] (Iowa, Texas, and Wyoming) expressly provide for the dissolution, forfeiture of charter, license, etc., of corporations violating certain statutes relating to issuance of stock, etc.

Michigan requires an affidavit of at least three of the incorporators as to the valuation of property for which stock is issued, this affidavit to be attached to the articles of association;[3] Utah requires the affidavit of three persons acquainted with the property, except in case of mining or irrigation companies;[4] and Vermont requires an affidavit of the president and treasurer, or a majority of the incorporators or directors of the corporation, setting forth the amount of stock proposed to be issued and the property or consideration which is to be received for such stock. The description of the property or consideration is to be in sufficient detail to satisfy the secretary of state, with whom said affidavit shall be filed, that the same can be readily identified.[5]

Texas authorizes the attorney general when convinced that a corporation has issued any stock, etc., in violation of the law to institute quo warranto or other appropriate judicial proceedings to have such stocks or bonds canceled, expunged, and held for naught.[6]

Fourteen States[7] (Alabama, Connecticut, Indiana, Maryland, Massachusetts, Michigan, Missouri, Nevada, Ohio, South Carolina, Utah, Vermont, Virginia, and West Virginia) require a detailed description of the property for which capital stock is issued to be filed for the inspection of the public or interested parties. In Indiana and Ohio this requirement applies only to public-service corporations.

Five States[8] (New Mexico, New York, North Carolina, Oregon, and Wyoming) provide in substance that when stock is issued for property, no statement, report, etc., published or filed shall report

[1] Texas, Rev. Civil Stats., 1911, art. 6471.

[2] Iowa, 32 G. A., chap. 71, sec. 4; Texas, Rev. Civil Stats., 1911, arts. 1146, 1167; Wyoming, Laws 1909, chap. 162, sec. 2.

[3] Michigan, Howell's Stats., sec. 9533.

[4] Utah, Comp. Laws, 1907, sec. 316.

[5] Vermont, Laws 1910, No. 143, sec. 6.

[6] Texas, Rev. Civil Stats., 1911, art. 1147.

[7] Alabama, Civil Code, 1907, sec. 3467; Connecticut, P. A. 1903, chap. 194, sec. 12; Indiana, Laws 1913, chap. 76, sec. 91; Maryland, Laws 1908, chap. 240, sec. 36; Massachusetts, Business Corp. Law, 1903, sec. 14; Michigan, Howell's Stats., sec. 9533; Missouri, Laws 1911, p. 148; Nevada, Laws 1903, chap. 88, sec. 55; Ohio, Gen. Code, sec. 614-54, added by Laws 1911, p. 565; South Carolina, Code, 1912, sec. 2836; Utah, Comp. Laws 1907, sec. 316; Vermont, Laws 1910, No. 143, sec. 6; Virginia, Corp. Act, 1903, chap. 5, sec. 9; West Virgina, Code, chap. 53, sec. 24.

[8] New Mexico, Laws 1905, chap. 79, sec. 55; New York, Stock Corp. Law, sec. 55; North Carolina, Revisal 1908, sec. 1172; Lord's Oreg. Laws, sec. 6696; Wyoming, Laws 1907, chap. 70, sec. 8.

this stock issued for cash paid, but it shall be recorded in this respect according to the facts.

The issuing of watered stock is further deterred by other provisions in a number of the public-utility acts, which carefully limit the purposes for which stock may be issued and require the companies to account to the proper commission for the disposition of the proceeds of sales of stock, bonds, etc.

Selected provisions.—California, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New York, Ohio, Pennsylvania, Texas, and Wisconsin constitute a group of States that have enacted comprehensive laws to prevent stock watering.

In some of these States the statutes apply to practically all classes of corporations while in others only to certain classes, such as public-service or railroad corporations. Of the former class Massachusetts and Iowa may be mentioned as having apparently effective laws; and of the latter, the Wisconsin act is an extensive and carefully drawn statute. The scope of this chapter will not permit the presentation of the various laws in detail, and the substance of the provisions of the Iowa and Wisconsin statutes relating to this subject is therefore given, together with the substance of a law of New York regarding shares of stock without par value.

Iowa Law: Chapter 71, section 1, of the General Acts of 1907, and chapter 76, of the General Acts of 1911, provide as follows:

No domestic corporation (building and loan associations excepted) "shall issue any capital stock or any certificate or certificates of shares of capital stock, or any substitute therefor, until the corporation has received the par value thereof. If it is proposed to pay for said capital stock in property or any other thing than money, the corporation proposing the same must, before issuing capital stock in any form, apply to the executive council of the state of Iowa for leave so to do. Such application shall state the amount of capital stock proposed to be issued for a consideration other than money, and set forth specifically the property or other thing to be received in payment for such stock. Thereupon, it shall be the duty of the executive council to make investigation, under such rules as it may prescribe, and to ascertain the real value of the property or other thing which the corporation is to receive for the stock; and shall enter its finding, fixing the value at which the corporation may receive the same in payment for capital stock; and no corporation shall issue capital stock for the said property or thing in a greater amount than the value so fixed and determined by the executive council." [1]

"Provided that for the purpose of encouraging the construction of new steam or electric railways, and manufacturing industries within this state, the labor performed in effecting the organization and promotion of such corporation, and the reasonable discount allowed or reasonable commission paid in negotiating and effecting the sale of bonds for the construction and equipment of such railroad or manufacturing plant, shall be taken into consideration as elements of value in fixing the amount of capital stock that may be issued." [2]

Other sections of the law provide for the cancellation, at the suit of the State, of stock issued in violation of the act, and the return

[1] Iowa, 32 G. A. (1907), chap. 71, sec. 1. [2] Iowa, 34 G. A. (1911), chap. 76.

by the corporation of the consideration received for the stock.[1] A corporation may also be dissolved for such violation and the officer, agent, or representative who violates any of the provisions of the act may be fined and imprisoned.[2]

Wisconsin Law: The relevant provisions of the Wisconsin law applying to public-service corporations are substantially as follows:

A public-service corporation may issue stocks, certificates of stock, bonds, notes, or other evidences of indebtedness, when necessary for any one or more of the following purposes:

(*a*) For organization expenses and all other expenses reasonably required in connection with the financing and construction of its property.

(*b*) For the construction, acquisition, extension, or improvement of its plants, distributing system, or facilities, or for the improvement of its service.

(*c*) For the discharge or refunding of its legal obligations.

(*d*) For so increasing the total amount of its stocks, certificates of stock, bonds, notes, and other evidences of indebtedness, where such total is less than the value of its property, as found by the commission, as to equal or more nearly equal such value.

(*e*) In case of railroad corporations for any of the purposes stated in section 1826 or subsection 10 of section 1828 of the statutes.[3]

Except as authorized in section 1753–14, (see p. 229) no public-service corporation shall issue any stocks or certificates of stock except in consideration of money, or of labor or property, at its true money value, as found and determined by the commission as provided in sections 1753–1 to 1753–22, inclusive, actually received by it, and equal to the face value thereof, nor any bonds, notes, or other evidences of indebtedness except for money or for labor or property estimated at its true money value, as found and determined by the commission as in said sections provided, actually received by it and equal to a sum not less than 75 per cent of the face value thereof, provided, however, that no bonds, notes, or other evidences of indebtedness of any such corporation issued for the purpose of refunding, retiring, or discharging any of its bonds, notes, or other evidences of indebtedness, shall be issued at less than 75 per cent of the face value thereof, plus the amount of any discount hereafter paid or incurred by such corporation upon the issuance of the bonds, notes, or other evidences of indebtedness to be refunded, retired, or discharged. All stocks, certificates of stock, bonds, notes, and other evidences of indebtedness, of any public-service corporation issued contrary to the provisions of said sections shall be void.[4]

No public-service corporation shall hereafter issue any stocks, certificates of stock, bonds, notes, or any other evidences of indebted-

[1] Iowa, 33 G. A. (1909), chap. 104, sec. 4.
[2] Iowa, 32 G. A. (1907), chap. 71, secs. 4, 5.
[3] Wisconsin, Stats., 1913, sec. 1753–5.
[4] Wisconsin, Stats., 1913, sec. 1753–7.

ness, except such as are issued for money only and payable one year or less from the date thereof, until it shall have first obtained authority for such issue from the commission.[1]

In case stocks, certificates of stock, bonds, notes, or other evidences of indebtedness, payable more than one year after the date thereof, are to be issued for the purpose authorized in paragraph (*d*) of subsection 1 of section 1753–5 (see p. 227), the corporation shall file with the commission a statement signed and verified by its president, or vice president, and secretary stating the fact that the issue is to be made for such purpose and setting forth—

(*a*) The amount and character of the stocks, certificates of stock, bonds, notes, or other evidences of indebtedness proposed to be issued.

(*b*) The terms on which they are to be issued.

(*c*) The application which is to be made of the proceeds, if any, derived therefrom.

(*d*) The total assets and liabilities and the previous financial operations and business of the corporation, in such detail as the commission may require.

If the commission shall determine that the proposed issue complies with the provisions of this act, such authority shall thereupon be granted and it shall issue to the corporation a certificate of authority stating (*a*) the amount of such stocks, certificates of stock, bonds, notes, or other evidences of indebtedness reasonably necessary for the purpose for which they are to be issued, and the character of the same; (*b*) the purpose for which they are to be issued; (*c*) the terms upon which they are to be issued; (*d*) the application which is to be made of the proceeds, if any, derived therefrom; and (*e*) the true value of the property upon which such issue is based. Such corporations shall not dispose of such stocks, certificates of stock, bonds, notes, or other evidences of indebtedness, or apply the proceeds derived therefrom, on any terms or in any manner not specified in such certificate.[2]

No public-service corporation shall issue any stocks, certificates of stock, bonds, notes, or other evidences of indebtedness for money, property, or services, or for the purpose authorized in paragraph (*d*) of subsection 1 of section 1753–5 (see p. 227), until there has been recorded upon the books of such corporation the certificate of the railroad commission.[3]

The commission shall have the power to require public-service corporations to account for the disposition of all stocks, certificates of stock, bonds, notes, and other evidences of indebtedness, and of the proceeds of all sales of stocks, certificates of stock, bonds, notes, and all other evidences of indebtedness issued pursuant to sections

[1] Wisconsin, Stats., 1913, sec. 1753–9, subsec. 1.
[2] Wisconsin, Stats., 1913, sec. 1753–9, subsec. 8.
[3] Wisconsin, Stats., 1913, sec. 1753–12.

1753–1 to 1753–22, inclusive, in such form and detail as it may deem advisable, and to do and perform any and all acts necessary to carry out the provisions of said sections.[1]

No public-service corporation shall declare any stock or bond dividend, or divide the proceeds of the sale of any stock or bonds among its stockholders; provided that where stocks, certificates of stock, bonds, notes, or other evidences of indebtedness shall be issued for the purposes authorized in paragraph (*d*) of subsection 1 of section 1753–5 (see p. 227), such new stocks, certificates of stock, bonds, notes, or other evidences of indebtedness, or any part thereof, or the proceeds or any part of the proceeds derived therefrom, may be distributed equally, share for share, among the holders of stock or certificates of stock of such corporation already issued.[2]

Other sections of the law provide that any corporation, its agent, director, or officer who shall cause to be issued any stock, bonds, or other evidences of indebtedness in violation of the law, or who shall apply the proceeds of the sale thereof to any purposes other than specified in the certificate of the commission, shall be fined not less than $500 nor more than $10,000 for each offense, and all stocks, bonds, etc., so issued shall be void.[3]

New York Law—Stock Without Par Value: New York has a law providing for the issuance by certain corporations of shares of stock without any nominal or par value. This is a provision not found in the laws of any other State. That part of the law relating to the issuance of the stock is substantially as follows:

Upon the formation or the reorganization of any stock corporation, other than a moneyed corporation, or a corporation under the jurisdiction of any public-service commission, the certificate of incorporation may provide for the issuance of the shares of stock of such corporation, other than preferred stock having a preference as to principal, without any nominal or par value by stating in such certificate—

1. The number of shares that may be issued by the corporation, and if any of such shares be preferred stock, the preferences thereof. If such preferred stock or any part thereof shall have a preference as to principal, the certificate shall state the amount of such preferred stock having such preference, the particular character of such preferences, and the amount of each share thereof, which shall be $5 or some multiple of $5, but not more than $100.

2. The amount of capital with which the corporation will carry on business, which amount shall be not less than the amount of preferred stock (if any) authorized to be issued with a preference as to principal, and in addition thereto a sum equivalent to $5 or to some multiple

[1] Wisconsin, Stats., 1913, sec. 1753–13.
[2] Wisconsin, Stats., 1913, sec. 1753–14.
[3] Wisconsin, Stats., 1913, secs. 1753–17 and 1753–19.

of $5 for every share authorized to be issued other than such preferred stock; but in no event shall the amount of such capital be less than $500.

Such statements in the certificate shall be in lieu of any statements prescribed by the law under which the corporation shall have been formed or reorganized as to the amount or the maximum amount of its capital stock or the number of shares into which the same shall be divided, or of the amount or the par value of such shares.

Each share of such stock without nominal or par value shall be equal to every other share of such stock, subject to the preferences given to the preferred stock, if any, authorized to be issued. Every certificate for such shares without nominal or par value shall have plainly written or printed upon its face the number of such shares which it represents and the number of such shares which the corporation is authorized to issue, and no such certificate shall express any nominal or par value of such shares. The certificates for preferred shares having a preference as to principal shall state briefly the amount which the holders of each of such preferred shares shall be entitled to receive on account of principal from the surplus assets of the corporation in preference to the holders of other shares, and shall state briefly any other rights or preferences given to the holders of such shares.

Such corporation may issue and may sell its authorized shares, from time to time, for such consideration as may be prescribed in the certificate of incorporation, or as from time to time may be fixed by the board of directors pursuant to authority conferred in such certificate, or if such certificate shall not so provide, then by the consent of the holders of two-thirds of each class of shares then outstanding given at a meeting called for that purpose in such manner as shall be prescribed by the by-laws. Any and all shares issued as permitted by this section shall be deemed fully paid and nonassessable and the holder of such shares shall not be liable to the corporation or to its creditors in respect thereof.[1]

The act also provides that in case the amount of capital stated in its certificate of incorporation shall be increased, such corporation shall not increase the amount of its indebtedness then existing until it shall have received in money or property the amount of such increase. The directors assenting to the creation of any debt in violation of this provision shall be liable jointly and severally for such debt, and no such corporation shall declare any dividend which will reduce the amount of its capital below that stated in its certificate. Provision is also made for the increase or reduction of the capital of such corporations.[2]

[1] New York Stock Corp. Law, sec. 19.

[2] New York Stock Corp. Law, secs. 20, 22.

CHAPTER V.

TRUST LAWS IN FOREIGN COUNTRIES.

Section 1. Introductory.

The laws in foreign countries concerning trusts, or combinations to control the market, present a great variety of governmental policy, extending from prohibition under the criminal law to compulsory obligation to form such combinations in certain specific cases. The three chief types of policy, however, with regard to the legal status of such combinations are (1) prohibition under the criminal law, (2) invalidity under civil law, and (3) validity under the civil law. Where combinations are prohibited under the criminal law they are generally invalid under the civil law also. Among the countries in which such combinations are prohibited by the criminal law may be specially mentioned Canada, Australia, New Zealand, France, and Russia; among those in which such combinations are invalid under the civil law merely, Austria should be specially noted; while among those which generally give free scope to monopolistic combinations Germany, Belgium, Switzerland, and Italy are the most important. According to the English law combination agreements may or may not be invalid, according to the circumstances. Laws of a compulsory character, tending to the establishment of monopolistic conditions in a particular industry, are found in Germany, Italy, Roumania, Russia, Brazil, and recently, for a brief period, in Austria also. It may be noted further that some countries which have laws generally permitting monopolistic combinations, such as Germany, prohibit under the criminal law particular forms, such as combinations with respect to bidding on contracts. Some countries have, apparently, no general legislation on this subject.

With respect to the particular provisions of the laws which are quoted or referred to below, it should be noted that in some cases they are special statutes expressly relating to combinations of competitors, etc., while in other cases they are merely parts of the general criminal and civil law. Provisions of the general criminal law which are relevant to such combinations are usually so expressed as to make their application obvious. The relevant provisions of the general civil law, however, are chiefly those regarding the validity of agreements, and these do not usually refer expressly to such combinations. Their application to this subject depends, therefore, on judicial interpretation. In most countries where such provisions are cited

judicial interpretations have been found and some of the cases are referred to in the text. In other countries where substantially identical provisions exist such judicial interpretation does not appear to have been made. Inasmuch as the judicial interpretations of similar provisions of law in different countries are often unlike, the meaning and effect of the law is sometimes doubtful where the courts have not defined it.

In most foreign countries monopolistic combinations are generally formed on the basis of agreements between competitors for fixed periods (cartels); consolidations of competitors by means of a holding company or merger are comparatively rare. For this reason the laws respecting the right of one company to hold the stock of a competing company or the right to merge competing companies, are not of great practical significance in this connection and are not included in the following discussion. No instances have been noted where a combination has been declared unlawful on either of these grounds.

In foreign countries which forbid combinations that restrict competition the prohibition generally does not extend to those which are regarded as reasonable in extent or in their practical operation. The fact, therefore, that such combinations frequently exist in most of the countries mentioned does not afford a safe basis for judging of the effectiveness of the laws.

A proper appreciation of the effectiveness and the results of the legislative policies of foreign countries would require, of course, a very comprehensive knowledge of the economic facts and the way in which the laws are administered. No attempt is made to discuss these aspects of the subject.

The following discussion of legislation regarding trusts or other monopolistic organizations is limited to private industry, and the subject of Government monopolies is not considered. Various countries have established such monopolies in particular industries, as, for example, France for tobacco. This discussion, moreover, does not cover legislation according to which various Governments have engaged in industry in competition with private concerns, though this may have had for one of its purposes the placing of a check on monopolistic tendencies of private industry. Furthermore, no attempt has been made to include any special measures adopted by belligerent countries since the outbreak of the present war, which relate to this general subject.

While the legislation and judicial decisions on unfair competition do not have necessarily any relation to the question of combinations and are treated separately in this report (for foreign countries, see Chap. X, p. 529), yet in some instances certain combination practices directly tending to destroy competition have been declared unlawful and are therefore noted in this connection.

Section 2. England.

Some aspects of ancient legislation in England regarding monopolies or combinations to control the market have been discussed in Chapter I. (See pp. 2–3.) So far as the practices of engrossing regrating, and forestalling are concerned, they are no longer criminal, although attempts to affect prices by spreading false rumors or by preventing, by force or threats, goods from being brought to market are still prohibited. So, also, as already noted, the criminal statutes against combinations to fix prices or wages have been repealed, while the ancient common-law rules which made them criminal have been abrogated by statute.

COMMON LAW.—The only law in England at the present time affecting combinations to control the market is the common law. According to the common law contracts or combinations in restraint of trade may or may not be void; they are upheld by the courts if shown to be reasonable as between the parties, and not against public policy. In the interpretation of ordinary contracts for the sale of property and business the courts, as stated elsewhere (see p. 27), have in recent years given them a somewhat more liberal construction than has generally prevailed in the United States in cases where common-law rules have been applied. Furthermore, in the interpretation of the law regarding combinations in restraint of trade, or to control the market, the English courts have generally been willing to aid in their enforcement in cases where they would apparently have been declared contrary to public policy at common law in the United States. The policy of the English law is to encourage competition, but it apparently places no serious obstacles to combination. As observed in a recent decision, "the public interest in the one case may be on the side of freedom of contract, while on the other it is on the side of freedom of trade." [1] The English courts seem to incline generally to the side of freedom of contract. The validity of permanent consolidations of competing industrial enterprises has apparently never been questioned in the courts. There have been only a few cases in the English courts regarding combinations, which are briefly noted below.

In 1829 an agreement for a division of markets between three box manufacturers was declared enforceable as not unreasonable between the parties, and not a monopoly, as other manufacturers were not restrained from competing.[2]

In 1855 an agreement of manufacturers to oppose combination among their employees by which each manufacturer obligated himself

[1] Mason v. Provident Clothing & Supply Co. (Ltd.), (House of Lords), Law Reports, Appeal Cases, 1913, pp. 724, 738.

[2] Wickens v. Evans, 3 Y. & J., 318.

to conduct his business in accordance with rules laid down by the majority concerning wages, hours of work, and the closing down of mills, if need be, was held invalid as against public policy.[1]

In 1875 an agreement between four quarrymen that one of them should not bid on a public contract and that two of the others should bid higher than the fourth was held a valid contract and not a conspiracy.[2]

In 1879 an agreement between four stevedores as to a division of the business in the port of Melbourne was held reasonable and valid, except where (by reason of an apparent oversight in the agreement) a vessel owner's refusal to employ one stevedore prevented all the others from doing the work and left him without the services of any.[3]

A price agreement of mineral-water manufacturers, binding them for 10 years to maintain a fixed price, was declared void as being unreasonable both as to the period of time and the area involved.[4] In this same case the lower court held the agreement void as having no legal consideration.[5]

An important case in English jurisprudence in this connection is Mogul Steamship Co. *v.* McGregor Gow & Co.[6] The defendants were a "conference" or combination of shipping companies which endeavored to exclude the plaintiffs from the Hankow tea trade by offering rebates to shippers who patronized conference lines exclusively, and by cutting rates. Damages were sought for conspiracy to injure plaintiffs, and it was alleged that the conference was unlawful, being in restraint of trade. The court held unanimously that such an agreement would not give the plaintiffs ground for an action for damages. Some of the judges regarded the conference agreement as unenforceable. This case is often misstated as holding that the combination itself was lawful, a point which was not in issue and upon which the various opinions apparently differed.

An association of butchers in Glasgow informed the cattle salesmen on a public wharf, which was the only wharf in Scotland where American and Canadian cattle were licensed to be sold, that they would not buy from them if they accepted bids from cooperative stores. The cooperative stores brought an action for damages against the association and prayed for an injunction against the cattle salesmen to prevent such discrimination. The court held that the cattle

[1] Hilton *v.* Eckersley, 6 E. & B., 47.
[2] Jones *v.* North, L. R. 19 Eq., 426.
[3] Collins *v.* Locke, 4 A. C., 674.
[4] Urmiston *v.* Whitelegg, 7 Times Law Reports, 295, Court of Appeals, 1891.
[5] 63 L. T., 455.
[6] House of Lords, 1892, Appeal Cases, 25.

salesmen were entitled to make such discrimination and that the butchers were not liable for damages.[1]

Certain members of a liquor dealers association executed a deed which provided that the parties thereto should not sell below a certain schedule of prices (which was the ordinary maximum schedule) in specified districts, including Cork, and fixed penalties for breach thereof, but also provided that they could withdraw from the agreement on six months' notice. A dealer, who did not give the stipulated notice, sold at lower prices than those agreed on. Plaintiff sued for an injunction to prevent further violation of the agreement, for the payment of the penalties provided, etc. The court held that the agreement was not unreasonable between the parties, that the prices were not unreasonable, and that publicans were not prevented from purchasing supplies elsewhere, and granted the injunction and damages for breach of agreement.[2]

One of the rules of a cooperative creamery society provided that any milk-supplying member should deliver to the society on every working day all the milk produced from his cows, except that required for his household use, and that any member failing to do so should pay to the society certain penalties. The rules did not provide for the voluntary withdrawal of a member except by transfer of his shares for which the consent of a committee was necessary. The court of appeal, reversing the judgment of the King's Bench Division, held that the rule requiring the delivery of milk was void as an illegal restraint of trade.[3]

The Northwestern Salt Co. entered into an agreement with the Electrolytic Alkali Co. whereby the former practically bound itself to sell its output of salt to the latter for a term of years and also limited its commercial activities in other ways. Sued for a violation of this agreement the Northwestern Salt Co. purposely avoided raising the question of the validity of the agreement in the pleadings but sought to show during the trial that the Electrolytic Salt Co. had similar contracts with other producers and was guilty of an unlawful restraint of trade. Objection to such evidence was sustained by the court and judgment rendered for the plaintiff. On appeal the House of Lords held that having regard to the form of the pleadings such circum-

[1] Scottish Cooperative Wholesale Society *v.* Glasgow Fleshers' Trade Defence Association, 35 Scottish Law Rep., 645 (1898).

In connection with this case it is of interest to note that the local authorities on June 7, 1898, passed a by-law which, among other things, provided that the sales rings on the wharf in question "shall not be used for private sales, or for sales to any limited number of persons, or for sales in which any class of the public are excluded from bidding or buying." This by-law was upheld in Scott and Others *v.* Magistrates of Glasgow; 36 Scottish Law Rep., p. 458 (1899).

[2] Cade *v.* Daly, Irish Reports, Chancery 1910, p. 306.

[3] Tipperary Cooperative Creamery Society *v.* Hanley, Irish Reports, King's Bench 1912, p. 586.

stances could not be looked into for determining the legality of the agreement and that the agreement was on its face a legal one.[1]

A recent and important case[2] on this subject was decided by the Privy Council on appeal from the High Court of the Commonwealth of Australia. The facts of the case will be set forth in more detail in connection with the discussion of the laws of Australia, together with those parts of the decision and opinion especially pertinent to the Australian statutes. (See pp. 245–246.) The case involved, however, an interpretation of the English common law with respect to restraint of trade and monopoly. Very briefly stated, the facts were as follows: Certain colliery companies in Australia combined in a vending agreement which apportioned the production and fixed the prices of coal, and made another agreement with certain shipping companies which provided for mutual exclusive dealing and fixed the maximum resale prices of coal to be charged by the shipping companies. Under the Australian law (see p. 243) it was necessary for the Government to prove that the combination complained of had restrained or monopolized trade, etc., "to the detriment of the public." The Crown contended that such detriment must be legally presumed in the case of contracts which are void as in restraint of trade. The court rejected this claim and in this connection stated the nature of the common law in England both as to restraint of trade and monopoly. The court said in part (pp. 793–797):

> At common law every member of the community is entitled to carry on any trade or business he chooses and in such manner as he thinks most desirable in his own interests, and inasmuch as every right connotes an obligation no one can lawfully interfere with another in the free exercise of his trade or business unless there exist some just cause or excuse for such interference. Just cause or excuse for interference with another's trade or business may sometimes be found in the fact that the acts complained of as an interference have all been done in the bona fide exercise of the doer's own trade or business and with a single view to his own interests (the Mogul Steamship case[3]). But it may also be found in the existence of some additional or substantive right conferred by letters patent from the Crown or by contract between individuals. In the case of letters patent from the Crown this additional or substantive right is generally described as a monopoly. In the latter case the contract on which the additional or substantive right is founded is generally described as a contract in restraint of trade. Monopolies and contracts in restraint of trade have this in common, that they both, if enforced, involve a derogation from the common law right in virtue of which any member of the community may exercise any trade or business he pleases and in such manner as he thinks best in his own interests.
>
> The right of the Crown to grant monopolies is now regulated by the Statute of Monopolies, but it was always strictly limited at common law. A monopoly being a derogation from the common right of freedom of trade could not be granted without consideration moving to the public, just as a toll being a derogation from the public

[1] North Western Salt Co. *v.* Electrolytic Alkali Co., House of Lords, Law Reports, Appeal Cases, 1914, p. 461.

[2] Attorney General of the Commonwealth of Australia *v.* Adelaide Steamship Co. (Ltd.) et al. (Privy Council), Law Reports, Appeal Cases, 1913, p. 781.

[3] 23 Q. B. D. 598; (1892) A. C. 25.

right of passage could not be granted without the like consideration. In the case of new inventions the consideration was found either in the interest of the public to encourage inventive ingenuity or more probably in the disclosure made to the public of a new and useful article or process. * * *

Contracts in restraint of trade were subject to somewhat different considerations. There is little doubt that the common law in the earlier stages of its growth treated all such contracts as contracts of imperfect obligation, if not void for all purposes; they were said to be against public policy in the sense that it was deemed impolitic to enforce them and not because every such contract must necessarily operate to the public injury. The old common law rule against enforcing such contracts has, however, been relaxed in more recent times. Though, speaking generally, it is the interest of every individual member of the community that he should be free to earn his livelihood in any lawful manner, and the interest of the community that every individual should have this freedom, yet under certain circumstances it may be to the interest of the individual to contract in restraint of this freedom, and the community if interested to maintain freedom of trade is equally interested in maintaining freedom of contract within reasonable limits. * * * Their Lordships are not aware of any case in which a restraint though reasonable in the interests of the parties has been held unenforceable because it involved some injury to the public. Lindley and Bowen L. JJ. had suggested in the Court below that though a restraint might be reasonable as between the parties to the contract it might be unenforceable because of the "law which forbids monopolies," or because it was calculated to create "a pernicious monopoly," and there is a similar suggestion by Lindley L. J. in Underwood *v.* Barker.[1] The term monopoly can not be here used in its proper legal signification of a right granted by the Crown, nor can the expression "the law which forbids monopolies" refer to any common law or statutory rule limiting the Crown's prerogative in this respect. The learned Lords Justices are contemplating a state of circumstances in which some trade or industry has passed or is likely to pass into the hands or under the control of a single individual or group of individuals, and are indicating that if a restraint on trade is likely to produce this result, it may on grounds of public policy be unenforceable however reasonable in the interests of the parties to the contract. Such a state of circumstances may, by eliminating competition, entail the evils thought to be incident to monopoly rights granted by the Crown, and may therefore in a popular sense be called a monopoly. * * *

The chief evil thought to be entailed by a monopoly, whether in its strict or popular sense, was the rise in prices which such monopoly might entail. The idea that the public are injuriously affected by high prices has played no inconsiderable part in our legal history. It led, no doubt, to the enactment of most, if not all, of the penal statutes repealed by 12 Geo. 3, c. 71. It also lay at the root of the common law offence of engrossing, which, according to Hawkins' Pleas of the Crown, vol. ii., bk. 1, ch. 79, consisted in buying up large quantities of wares with intent to resell at unreasonable prices. It influenced the Courts in their attitude towards contracts in restraint of trade. Although, therefore, the whole subject may some day have to be reconsidered, there is at present ground for assuming that a contract in restraint of trade, though reasonable in the interests of the parties, may be unreasonable in the interests of the public if calculated to produce that state of things which is referred to by Lindley and Bowen L. JJ. as a pernicious monopoly, that is to say, a monopoly calculated to enhance prices to an unreasonable extent. * * *

It is only necessary to add that no contract was ever an offence at common law merely because it was in restraint of trade. The parties to such a contract, even if unenforceable, were always at liberty to act on it in the manner agreed. Similarly combinations, not amounting to contracts, in restraint of trade were never unlawful

[1] (1899) 1 chap. 300.

at common law. To make any such contract or combination unlawful it must amount to a criminal conspiracy, and the essence of a criminal conspiracy is a contract or combination to do something unlawful, or something lawful by unlawful means. The right of the individual to carry on his trade or business in the manner he considers best in his own interests involves the right of combining with others in a common course of action, provided such common course of action is undertaken with a single view to the interests of the combining parties and not with a view to injure others (the Mogul Steamship case [1]).

So far as these two particular contracts were concerned the court held that both the vending agreement of the colliery companies, which related to apportioning the output and fixing the price of coal, and the contract for mutual exclusive dealing between the colliery companies and the shipping companies, and the fixing of a maximum resale price of coal for the shipping companies, were contracts in restraint of trade, but it did not state whether they were enforceable or not.

RAILROADS.—Although the law respecting railroad combinations is somewhat apart from the present subject, it may be noted that in recent years Parliament has not generally attempted to provide for competition among such carriers by granting franchises to competing roads when the public conveniences of transportation were already established. The railroad law, however, provides that rates shall be reasonable, and also prohibits discriminations between persons.

An agreement between two railroads to pool profits was declared illegal in the High Court of Chancery in 1859 as ultra vires.[2] The court said that if such an amalgamation were lawful that all the railways of the kingdom might be combined into one concern.

In a case decided in the same court only two years later, a traffic agreement between two railway companies for dividing earnings and for avoiding competition was held to be not void as against public policy.[3]

It appears that at the present time such amalgamations must receive the approval of the court of the Railway and Canal Commission. A proposed working agreement between the Great Northern Railway Co. and the Great Central Railway Co. was not approved by the said court in 1908 on the ground that it was ultra vires under the charters. This decision was affirmed by the court of appeals.[4]

PATENTS.—An amendment of the patent laws in 1907 declares certain restrictions attached to the sale, lease, or use of patented articles, etc., to be in restraint of trade and null and void.[5]

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[1] 23 Q. B. D. 598; (1892) A. C. 25.
[2] Charlton v. The New Castle & Carlisle Ry. Co. and the Northeastern Ry. Co., 5 Jurist, N. S., 1096.
[3] Hare v. The London & Northwestern Ry. Co., 1861, 7 Jurist, N. S., 1145.
[4] Twentieth Annual Report of the Railway and Canal Commission, 1908.
[5] Patent and Designs (amendment) Act, 1907, chap. 28, sec. 24 (see p. 539).

Section 3. Canada.

There are several statutes in Canada which have a direct application to trusts or combinations to control the market. These are found in the Criminal Code, the customs laws, the patent laws, the inland-revenue laws, and in the recent Combines Investigation Act of 1910.

CRIMINAL CODE.—Under a law enacted in 1889 (52 Vic., chap. 41) certain forms of monopolistic combinations were prohibited. Later this law was slightly amended and now provides (Criminal Code of 1908, sec. 498), in part, as follows:

> Every one is guilty of an indictable offense and liable to a penalty not exceeding $4,000 and not less than $200, or to two years' imprisonment, or, if a corporation, is liable to a penalty not exceeding $10,000 and not less than $1,000, who conspires, combines, agrees, or arranges with any other person, or with any railway, steamship, steamboat, or transportation company—
>
> (*a*) To unduly limit the facilities for transporting, producing, manufacturing, supplying, storing, or dealing in any article or commodity which may be subject of trade or commerce; or,
>
> (*b*) To restrain or injure trade or commerce in relation to any such article or commodity; or,
>
> (*c*) To unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or,
>
> (*d*) To unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation, or supply of any such article or commodity, or in the price of insurance upon person or property.

Specifically excepted from this law are combinations of workmen or employees for their reasonable protection.

In this connection it may be noted that the courts have decided that combinations of employers to oppose such combinations of workmen are not prohibited.[1]

A number of convictions have resulted from criminal prosecutions under this law,[2] and it has also been successfully pleaded in defense of civil actions.[3] In these criminal cases the condemnations in each instance were obtained against members of trade associations which, among other things, attempted to fix prices. The prosecution of a grain broker as a member of a grain exchange resulted in acquittal,[4] as also one against a member of a grocers' association which established rules regarding resale prices and the sale of goods by manufacturers through regular wholesalers and discountenanced dealing with manufacturers who sold to irregular wholesalers.[5] On the other hand, agreements for fixing resale prices were successfully pleaded in defense of a civil action in one of the cases already referred to (Wam-

[1] Le Febvre *v.* Knott, 13 Canadian Criminal Cases, 223 (1907).

[2] Rex *v.* Elliott, 9 Ont. Law Rep., 648 (1905); Rex *v.* Master Plumbers' Association, 14 Ont. Law Rep., 295 (1907); Rex *v.* McMichael, 10 Ont. Wkly. Rep., 268 (1907); Rex *v.* McGuire, 7 Ont. Wkly. Rep., 225 (1905); Rex *v.* Clark, 14 Can. Crim. Cases, 57 (1907–8).

[3] Hately *v.* Elliott, 9 Ont. Law Rep., 185 (1905); Wampole *v.* Karn, 11 Ont. Law Rep., 619 (1906).

[4] Rex *v.* Gage, 13 Can. Crim. Cases, 415 (1907).

[5] Rex *v.* Beckett, 20 Ont. Law Rep., 401 (1910).

pole *v.* Karn). In a civil action for the enforcement of a pooling contract between two merchants, the court of appeals for Manitoba held that the agreement was not void at common law, and that the statutes made only such acts unlawful as were invalid at common law, but this decision was reversed by the supreme court of Canada, which held that the agreement was made unlawful by the statutes.[1] In an action to recover money advanced and interest thereon, the evidence disclosed an agreement whereby a cordage company obtained control of the manufacture of twine at a prison with the result that (1) a monopoly was established in the production of twine, and the prices of twine artificially fixed, and (2) a fraudulent decrease made in the production of twine. The court held that it was bound to take notice of this as a conspiracy injurious to the public interest, although it was not covered by the pleadings, and made a different disposition of the claims of the parties than it would have done if the transaction had been lawful.[2]

CUSTOMS TARIFF LAW.—A provision was made in the customs tariff law of June 29, 1897, which was substantially reenacted in the present Customs Tariff, 1907 (sec. 12), to the effect that whenever the governor in council deems it in the public interest to inquire into any alleged combination among manufacturers or dealers in any article to unduly promote their advantage at the expense of the consumers, a judge may be appointed to investigate the matter, and if he reports that such a combination exists, the governor in council may remove or reduce the duty in order to give the consumer the benefit of reasonable competition.

In 1902, in accordance with the provisions of the earlier law, the customs duty on news-print paper was reduced from 25 per cent to 15 per cent.

PATENT LAW.—This provides substantially that if a patentee does not meet the reasonable requirements of the public in regard to the patented article, compulsory licenses may be issued for its manufacture. On refusal of patentee to comply with order to grant license, a patent may be declared void in judicial proceedings.[3]

INLAND-REVENUE LAW.—By the act of August 10, 1904, the inland-revenue law was so amended as to provide that the license of any distiller, rectifier, compounder, brewer, or maltster, manufacturer of tobacco or cigars, or bonded manufacturer may be revoked by the minister of inland revenue if the licensee (1) makes a sale of such goods, or consigns them for sale upon commission, subject to the condition that the purchaser or consignee shall not sell or deal in similar goods produced by or obtained from any other manufacturer or dealer;

[1] Weidman *v.* Shragge, 46 Can. Supreme Court Reports, 1 (1912).
[2] Consumers Cordage Co. *v.* Connolly, 31 Can. Supreme Court Reports, 244 (1901).
[3] R. S., 1906, chap. 69; secs. 42–45.

or (2) makes a sale of such goods, or consigns them for sale upon commission, to another person upon such terms as would, in their application, give more profit to the purchaser or consignee if he should not sell or deal in goods of a like kind, produced by or obtained from any other manufacturer or dealer. The decision of the minister of inland revenue is final as to the facts in the case.

This act was passed as a result of an investigation by a royal commission appointed in 1903 under the provisions of chapter 114, Revised Statutes of Canada,[1] for the purpose of inquiring into an exclusive contract system alleged to be then employed by the American Tobacco Co. of Canada, and the Empire Tobacco Co. (Ltd.). It was charged that the object and effect of the system was to prevent those who dealt in goods made by these companies from selling those of other manufacturers, thus creating a monopoly. The commission reported that such a contract system existed in the cigarette and tobacco trade in Canada; that such contracts were not illegal either under the common law or any then existing statute, and that as a result other manufacturers were placed at a disadvantage. The act apparently has never been invoked.

COMBINES INVESTIGATION ACT.—The Combines Investigation Act was passed on May 4, 1910 (9–10 Edward VII, chap. 9).[2] A combine is defined in section 2 as follows:

"Combine" means any contract, agreement, arrangement or combination which has, or is designed to have, the effect of increasing or fixing the price or rental of any article of trade or commerce or the cost of the storage or transportation thereof, or of the restricting competition in or of controlling the production, manufacture, transportation, storage, sale or supply thereof, to the detriment of consumers or producers of such article of trade or commerce, and includes the acquisition, leasing or otherwise taking over, or obtaining by any person to the end aforesaid, of any control over or interest in the business, or any portion of the business, of any other person, and also includes what is known as a trust, monopoly or merger.

Briefly stated, the method of investigation is as follows: Where six or more British subjects of full age and residents of Canada believe that a combine exists and that prices have been enhanced or competition restricted thereby to the detriment of consumers or producers, they may make application in writing to a judge for an order directing an investigation, setting forth in the application the particulars of the case. Upon such application the judge is required to give a hearing, and if it appears to him that there are reasonable grounds for the charge and that it is in the public interest to hold an investigation, he shall order one to be made by a board. Such board

[1] This law is now chap. 104, R. S., 1906. It provides for investigation by the governor in council into any matter connected with the good government of Canada or the conduct of any part of the public business, and for the enforcement of attendance of witnesses and compelling of evidence.

[2] The text of this law is given in Exhibit A of this report. See p. 737.

consists of three persons, one nominated by the complainants, one by the parties complained of, and the third is a judge chosen by the other two. This board has the power to summon witnesses and to compel the production of books and papers. The report of the findings of the board are published in The Canada Gazette.

In addition to the publicity thus effected, additional remedial action may be taken, namely, removal or reduction of customs duties, revocation of letters patent, and criminal prosecution. Regarding the first-named remedy, the provisions are substantially the same as those described above (p. 240) under the customs tariff.

The prohibitions of the Criminal Code, given above (p. 239), are substantially reiterated in this act in section 23 which, however, provides different penalties:

> Any person reported by a Board to have been guilty of unduly limiting the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article which may be a subject of trade or commerce; or of restraining or injuring trade or commerce in relation to any such article; or of unduly preventing, limiting or lessening the manufacture or production of any such article; or of unreasonably enhancing the price thereof; or of unduly preventing or lessening competition in the production, manufacture, purchase, barter, sale, transportation, storage or supply of any such article, and who thereafter continues so to offend, is guilty of an indictable offence and shall be liable to a penalty not exceeding $1,000 and costs for each day after the expiration of 10 days, or such further extension of time as in the opinion of the Board may be necessary, from the date of the publication of the report of the Board in The Canada Gazette during which such person so continues to offend.

A patent may be revoked if the patentee is declared to have used his privileges to do substantially the things prohibited in section 23 just quoted, and this finding is proved by the evidence in subsequent judicial proceedings.

The only proceedings, apparently, under this act were in the case of Drouin et al. and United Shoe Machinery Co. of Canada, which were begun November 10, 1910. The board made a report on October 18, 1912, which found that the leases of the defendant unduly restricted competition in the manufacture, sale, etc., of shoe machinery in Canada.[1] No further action appears to have been taken.

RAILWAY ACT OF 1903.—Although the regulation of railways is somewhat apart from the present subject, it is interesting to note that the Railway Act of 1903 (3 Edward VII, chap. 58) established a board of railway commissioners for Canada, and provided, among other things, that the purchasing or leasing of railway companies must be approved by the governor general (sec. 281). It is further provided that no railway company shall, in the future, acquire the stocks or bonds of other railway companies in Canada (sec. 290).

[1] See The Labour Gazette, November, 1912, p. 466.

Section 4. Australia.

Several laws have been passed by the Commonwealth of Australia either aimed especially at combinations or containing important provisions with respect to them, and also an act for an interstate commission with strong powers over both transportation and industry.

Prior to the enactment of these laws, two cases affecting combinations were decided under the common law. In each of them members of a trade association, which fixed the prices of the commodity they dealt in, prevented a nonmember from getting supplies of goods because he sold at lower prices. In one case [1] it was held that no legal right of the plaintiff had been infringed, while in the other [2] it was held that an action for conspiracy would lie against the members of the association.

AUSTRALIAN INDUSTRIES PRESERVATION ACT, 1906–1910.—The Australian Industries Preservation Act is by far the most important law relating to combinations.[3] It was first enacted in 1906 and amended several times. It aims especially at the "repression of monopolies" and, as germane thereto, it also aims at the "prevention of dumping." The principal provisions of the law as amended, which is long and complicated, are briefly summarized in the following paragraphs:

Any person who enters into any contract or engages in any combination in relation to commerce with other countries or among the States (*a*) in restraint of or with the intent to restrain commerce, or (*b*) to the injury of or with the intent to injure by means of unfair competition any Australian industry advantageous to the Commonwealth, is guilty of an offense, and any contract in contravention of this prohibition is void.

A person proceeded against under the above provision, however, can defend the act complained of by showing (*a*) that the restraint was "not to the detriment of the public," and (*b*) that the restraint in question was "not unreasonable." Unfair competition is to be interpreted with respect to the circumstances and the following acts are deemed unfair unless proved not so: (*a*) If the defendant is a "commercial trust" (i. e., a combination of persons or corporations by means of a trust deed, an agreement, a board of management, or like means); (*b*) if the competition would result in inadequate remuneration for labor in the Australian industry; (*c*) or disorganize the same; (*d*) or if the defendant gives rebates, etc., on condition of exclusive patronage. Furthermore, in considering whether the com-

[1] Rea *v.* Buckland, 11 Western Australian Law Rept. 2 (1908).
[2] Taffs *v.* Beesley, 16 Australian Law Times, 59 (1894).
[3] The text of this law is given in Exhibit B of this report. See p. 746.

petition is unfair, regard shall be had to the question whether the Australian industry is managed with reasonable efficiency.

Any person who monopolizes or attempts or conspires to monopolize commerce with other countries or among the States is guilty of an indictable offense, and every contract made in contravention of this provision is void. Instead of proceeding by indictment, the attorney general may bring a civil action for recovery of the fines imposed, without jury trial.

The giving of rebates, etc., on condition of various specified forms of exclusive dealing, is also made an offense, and any contract made in contravention of this provision is void. A person proceeded against under this rule may defend the act complained of by showing that it was "not to the detriment of the public," not unfair competition, or not injurious to any Australian industry.

The refusal to deal with a person except under disadvantageous conditions because such person deals with some other person or with persons not belonging to a commercial trust, is made an offense in certain cases.

Any person injured by any of the foregoing forbidden acts may sue without jury trial for treble damages for injury incurred.

Persons questioned in proceedings under this law can not refuse to answer because it would incriminate them, but are given certain immunities from prosecution in connection with such matters, except in case of perjury.

Declaration to attorney general absolving criminal intent.—Any person who is a party to a contract, combination, etc., may declare the facts and purposes to the attorney general, and publish the same in the Gazette. The attorney general may at any time send a notice to the declarant that he regards such contract or combination in restraint of trade, etc. If before the declarant receives such notice a proceeding is brought against him, his prior declaration absolves him of unlawful intent, provided it is a true and complete statement. This provision, however, has not yet been availed of.

In proceedings for restraint of trade, attempt to monopolize, exclusive dealing, refusal to deal, etc., described above, the averments of the prosecution are presumed to be proved in absence of proof to the contrary, except (*a*) with respect to intent and (*b*) in proceedings by indictment.

The third part of this act, which deals with the prevention of dumping, is of present interest in connection with unfair competition and this part of the law, as well as other parts which have reference to unfair competition, are considered in some detail in Chapter X. (See p. 551.) It is worthy of particular note that the prevention of dumping is sought here through the antimonopoly statutes rather than through the laws relating to customs duties.

So far as known, this act was made the basis for the prosecution of a trust only in the coal vend case, which is discussed below. The lower court held that the combination had struck down competition and that it was obnoxious to the prohibition against monopoly. A fine of several hundred thousand dollars was imposed. This judgment was appealed to the High Court, where it was reversed and finally went to the judicial committee of the Privy Council, the supreme court of the British Empire, where the judgment of the High Court was affirmed in 1913.

COAL VEND CASE.[1]—This was an action to recover pecuniary damages from certain colliery and shipping companies and others under the Australian Industries' Preservation Act for alleged breaches thereof[2] and for an injunction against further violation of the law. The basis of the proceedings was an agreement between the colliery companies and the shipping companies of the following general character: The colliery companies agreed to sell to the shipping companies all the coal the latter required in interstate trade, at prices to be fixed annually by the colliery companies. The vendors agreed to sell coal for interstate trade to no other parties while the purchasers agreed to buy such coal only from the said vendors. The shipping companies bound themselves not to sell the coal at higher prices than those specified. It was also shown in evidence that the colliery companies had an agreement among themselves whereby the output of each colliery was apportioned and the selling price fixed by a governing board. Sales in excess of allotments obliged the party making them to pay certain fines to a common fund. The colliery companies also had an agreement with the coal miners whereby the wages of miners for each year varied with the increase or decrease in the "declared" or probable price of coal, according to a fixed scale; the "declared" price was jointly determined in advance, and might not be actually realized. The Crown contended that an unenforceable contract in restraint of trade was necessarily to the detriment of the public, within the meaning of sections 4 and 7 of the act. The court (Privy Council) denied this claim, and said in part (p. 800):

> It was strongly urged by counsel for the Crown that all contracts in restraint of trade or commerce which are unenforceable at common law, and all combinations in restraint of trade or commerce which if embodied in a contract would be unenforceable at common law, must be detrimental to the public within the meaning of the Act, and that those concerned in such contracts or combinations must be taken to have intended this detriment. Their Lordships cannot accept this proposition. It is one thing to hold that a particular contract cannot be enforced because it belongs to a class of contracts the enforcement of which is not considered to be in accordance with public policy, and quite a different thing to infer as a fact that the parties to such

[1] Attorney General of the Commonwealth of Australia *v.* Adelaide Steamship Co. (Ltd.) et al. (Privy Council), Law Reports, Appeal Cases, 1913, p. 781.

[2] Sec. 4, subsec. 1 (a), sec. 7, subsec. 1, and sec. 9.

contract had an intention to injure the public. It is quite common in a contract of service to find a clause restricting the area in which the employee may carry on a business similar to that of his employer after the termination of the service, and such area is often held too wide for the restraint to be enforceable. In such cases both parties have as a rule bargained with a single view to their own interests, though in the opinion of the Court they have been mistaken as to the area of the restraint required in their own interest, but it would be wrong to infer from this that they had any intention of injuring the public. It would be equally wrong to infer that such a sinister intention must have existed in cases of trade combinations, such as that which was the subject of the decision in Hilton *v.* Eckersley.[1]

The court held, nevertheless, that all these agreements were in restraint of trade, without stating whether they were enforceable or not at the common law.

The word "public" in the phrase "detriment to the public" was also defined to include all classes—producers and distributers, as well as consumers.

The court declared that in order to make out a case the Government must show either an intent to do a prohibited act, or that the acts done were of such a character as to leave no doubt of the intent.

The court denied that the nature of the agreement, the facts as to prices obtained, or the competitive methods used, gave evidence of an intent to restrain or monopolize trade to the detriment of the public within the meaning of the law. While prices in 1906 had been as low as 7s. 6d. f. o. b. Newcastle, and had subsequently been raised to 11s. and maintained there, the court thought that the prices in 1906 had been shown to be unduly low on account of "cut-throat" competition, and that the increase was not unreasonable, taking into consideration the increase in wages paid and reasonable rates of profit on investment. The court also called attention to the fact that the prohibitions in question were expressly directed to acts destructive of Australian industries. In this connection it noted also that the prices of coal exported which met international competition were not lower than for interstate trade. The agreement for exclusive mutual dealing between the colliery and shipping companies was also held by the court to afford no basis for action.

THE PATENTS ACT, 1903.—The features of the Patents Act of 1903, as amended in 1906 and 1909, which are of interest are the provisions for compulsory license and the restrictions placed on contracts made by patentees with respect to the obligation to use or not to use non-patented articles.

On petition to the Commissioner of Patents by an interested party declaring that the reasonable requirements of the public with respect to a patented article are not satisfied, the question may be submitted to the courts, which may grant compulsory licenses or revoke the patent under certain conditions. The term "reasonable

[1] 6 E. & B., 47.

requirements" is particularly defined in the law. Among other things, the patentee is held to be at fault if he has failed to grant licenses on reasonable terms, with the result that any existing trade or industry or the establishment of any new trade or industry in Australia is unfairly prejudiced, or the demand for the patented article is not reasonably met.

Patentees are prohibited from inserting conditions in contracts of sale, lease, or license, which would prevent the purchaser, lessee, or licensee from using another article, whether patented or not, supplied by another person, or to require said purchaser, etc., to acquire from the patentee any articles not protected by patent, and any such conditions are made null and void. This prohibition does not apply, however, if it is proved that the purchaser, etc., had the option of purchasing or acquiring the patented article on reasonable terms without such conditions, or if the purchaser, etc., had the right to abrogate the conditions in the contract after three months notice on payment of such sum as may be fixed by an arbitrator named by the Government.

INTERSTATE COMMISSION ACT, 1912.—A law was enacted on December 24, 1912, providing for an Interstate Commission.[1] The principal provisions of this law are substantially as follows:

The Interstate Commission consists of three members, one of whom is called the Chief Commissioner, appointed by the governor general for terms of seven years each. It is constituted a body corporate with perpetual succession, and may sue or be sued. Two commissioners constitute a quorum, and a majority of the commission shall make the decisions.

The general investigating powers of the commission are stated as follows:

> The Commission shall be charged with the duty of investigating, from time to time, all matters which in the opinion of the Commission ought in the public interest to be investigated affecting—(a) the production of and trade in commodities; (b) the encouragement, improvement, and extension of Australian industries and manufactures; (c) markets outside Australia, and the opening up of external trade generally; (d) the effect and operation of any Tariff Act or other legislation of the Commonwealth in regard to revenue, Australian manufactures, and industry and trade generally; (e) prices of commodities; (f) profits of trade and manufacture; (g) wages and social and industrial conditions; (h) labour, employment, and unemployment; (i) bounties paid by foreign countries to encourage shipping or export trade; (j) population; (k) immigration; and (l) other matters referred to the Commission by either House of the Parliament, by resolution, for investigation.

More detailed description is given of the matters the commission may investigate respecting waterways and the use of water for irrigation, etc.

[1] The text of this law is given in Exhibit C of this report. See p. 756.

The law makes special provisions regarding rates and discriminations therein with respect to transportation in interstate traffic, affecting both private and State railways. Unreasonable or unjust rates are prohibited. State railways may not make rates which unjustly discriminate against any State. In interpreting the law the commission may consider the financial responsibilities of the railways and the necessities of development of their territory.

The act contains the following prohibition also:

No common carrier or State Authority, other than a State Railway Authority, shall, in respect of interstate commerce, or so as to affect such commerce—(a) make or give any undue or unreasonable preference or advantage to any particular person, State, locality, or description of traffic; or (b) subject any particular person, State, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage.

Where such discrimination is made, the burden of proving its reasonableness rests on the carrier or State authority making it. The commission is given authority to decide the matter.

The commission is given judicial power as a court of record, as follows:

The Commission shall have jurisdiction to hear and determine any complaint, dispute, or question, and to adjudicate upon any matter arising as to—(a) any preference, advantage, prejudice, disadvantage, or discrimination given or made by any State or by any State Authority or by any common carrier in contravention of this Act, or of the provisions of the Constitution relating to trade and commerce or any law made thereunder; (b) the justice or reasonableness of any rate in respect of interstate commerce, or affecting such commerce; (c) anything done or omitted to be done by any State or by any State Authority or by any common carrier or by any person in contravention of this Act or of the provisions of the Consititution relating to trade or commerce or any law made thereunder.

"Commerce" is defined in this act to include "trade and traffic of all descriptions by land or water." "Traffic" is defined to include "the transportation of passengers and of goods." "Trade" is not defined, and it does not appear from the context whether it is substantially synonymous with traffic or includes other kinds of commerce than transportation. Nothing specifically appears in the act to show that these judicial powers cover other matters than transportation.

The commission is given broad powers of relief; among other things, it may (1) award damages; (2) order that a party be restrained by injunction; (3) declare a regulation, or any part thereof, void; (4) name a maximum rate for any service; (5) name both a maximum and a minimum rate; (6) name a maximum or minimum of difference between two rates; (7) determine the division of a joint rate; (8) require amendments of traffic rules and regulations; (9) fix pecuniary penalties for disobedience of its orders.

The commission has full jurisdiction to hear and determine all matters, whether of law or of fact, with the powers of a high court.

It may review, rescind, or vary any order. Appeal may be taken as follows:

> No appeal shall lie from the Commission except an appeal to the High Court on questions of law only.

Pending appeal the orders of the commission are not suspended unless otherwise ordered by the commission or the High Court.

The commission shall make annual reports and reports of investigations and publish such information regarding matters investigated as it thinks fit. The chief commissioner may summon witnesses and compel the production of books and papers, but evidence given by a witness shall not be used against him, "except in proceedings for an offence against this Act," in any court. Extensive provisions are made regarding witnesses, evidence, contempt of the commission, etc., which it is not necessary to describe here.

The first annual report of this commission was made on October 6, 1914.

The first investigation and report made with respect to an industrial combination related to printers, paper merchants, etc., and was published in 1914.[1] This report was made pursuant to the authority of the commission to investigate tariff questions, the trades affected by the combination being protected by tariff duties with respect to certain commodities. The commission found that a combination existed among most of the printers in the State of Victoria with respect to prices to be charged for printing; that they had made a contract with paper merchants and other suppliers of printers' materials whereby the members of the printers' combination should purchase exclusively of such merchants, and the latter should charge prices to noncombination printers 25 per cent higher than to the combination printers; that prices had been unduly advanced to the consumer in consequence, and that noncombination printers had been oppressively treated. The commission held that this combination was probably not subject to the prohibitions of the Australian Industries Preservation Act, because it was not an interstate combination, but that it had frustrated the intentions of Parliament with respect to tariff legislation by compelling noncombination printers to purchase supplies from abroad. The commission held further that under the constitution the problem could only be dealt with by State legislation, although the chief commissioner took the view that appropriate legislation by the Australian Parliament with respect to the tariff could provide for remitting protective duties in such cases.

[1] Report by the Interstate Commission upon a combination (known as Typothetae) between master printers, paper merchants and suppliers of printers' materials in the State of Victoria. May 6, 1914, Melbourne, Australia.

In this connection it may be noted that it was not the Interstate Commission but a temporary "Royal Commission" that in 1914 was intrusted with the duty of inquiring into and reporting on "the operations of any person, combination, or trust tending to create any restraint of trade or monopoly in connection with the export trade of meat from Australia." In pursuance thereof a report of the Royal Commission on the meat trade was issued on November 14, 1914.

Section 5. New Zealand.

Several laws have been enacted in New Zealand which are of interest in this connection, the two most important being the Monopoly Prevention Act of 1908, which embodied some previous legislation, and the Commercial Trusts Act of 1910.

THE MONOPOLY PREVENTION ACT, 1908.—The Monopoly Prevention Act substantially combined two previous acts, namely, the Agricultural Implement, Manufacture, Importation, and Sale Act, 1905, and the Flour and Other Products Monopoly Prevention Act, 1907. The law is divided into two parts, corresponding to the two acts mentioned above. Inasmuch as the first part of this act is chiefly of interest in connection with the question of unfair competition and is considered in Chapter X (see p. 551), it is unnecessary to consider it here.

The second part of the act gives to the governor, on recommendation of a certain court, the power to issue an order in council to remit the customs duty on flour. Such order may be revoked after a period of three months. It is provided that the court may from time to time, at the direction of the governor, make inquiry into the wholesale market price of flour, and if it finds that such price is unreasonably high, to recommend action by the governor, as stated above. The act declares that the price of flour is unreasonably high under the following circumstances:

(*a*) If the average price of flour in New Zealand is, relatively to the price of wheat in New Zealand, higher than the average price of flour in Australia relatively to the average price of wheat in Australia, unless in the opinion of the Court the additional price in New Zealand is justified by additional cost of production; or

(*b*) If the average price of wheat in New Zealand has, by reason of any combination among the holders of stocks of wheat, or by reason of any complete or partial monopoly established by any such holder, been raised above the price which would be determined by unrestricted competition.

The provisions as to the power of the governor to remit duties and of the court to inquire into the reasonableness of prices apply also to wheat and potatoes, and the act lays down the following rules in respect thereto:

* * * the price of wheat shall be deemed to be unreasonably high if the average wholesale price in New Zealand has, by reason of any combination among the holders

of stocks, or by reason of any complete or partial monopoly established by any such holder, been raised above the price which would be determined by unrestricted competition.

* * * the price of potatoes shall be deemed to be unreasonably high—(a) If the average wholesale price in New Zealand exceeds seven pounds per ton; or (b) If the average wholesale price in New Zealand has, by reason of any combination among the holders of stocks of potatoes, or by reason of any complete or partial monopoly established by any such holder, been raised above the price which would be determined by unrestricted competition.

The act specifies seven places in New Zealand and three places in Australia for which the market prices shall be ascertained in order to determine the respective average prices. To aid the court in determining the facts a special member for this purpose is added to the court to be named by certain agricultural societies, or failing such nomination, to be appointed by the governor. The court is authorized to use the powers conferred by the Commissions of Inquiry Act, 1908.

THE COMMERCIAL TRUSTS ACT, 1910.—The Commercial Trusts Act, enacted on November 21, 1910, was partly modeled on the Australian Industries Preservation Act, 1906–1910. The application of the law is limited to matters affecting the trade in the following commodities only: Agricultural implements, coal, meat, fish, flour, oatmeal (or other products of wheat and oats), petroleum (or other products of mineral oil), sugar, and tobacco (including cigars and cigarettes).

The offenses are substantially as follows:

(*a*) Every person commits an offense who gives a rebate or discount, etc., in connection with the sale of goods, on the express or implied condition that the person receiving the same will deal exclusively with the vendor for such goods, or generally, or will not deal with others, or will become a member of a commercial trust (see p. 252) or act in obedience to directions from such trust. (Sec. 3.)

(*b*) Every person commits an offense who refuses to sell or to supply another person either absolutely or on relatively disadvantageous conditions, because he will not deal exclusively with such vendor in that article, or generally, or will not become a member of a commercial trust or follow the directions of the same in respect to the sale, purchase, or supply of goods. (Sec. 4.)

(*c*) Any person who conspires to monopolize wholly or partially the demand or supply of goods in New Zealand, or any part thereof, is guilty of an offense if such monopoly is contrary to the public interest. (Sec. 5.)

(*d*) Every person commits an offense who sells, supplies, or offers goods at an unreasonably high price if the price is directly or indirectly controlled or influenced by a commercial trust with which he is or has been connected. It is also an offense if he commits the same

act at the suggestion or direction of a commercial trust, even though he is not connected therewith, and the price is not controlled by such trust. (Sec. 6.)

(*e*) If a commercial trust sells, supplies, or offers any goods at a price which is unreasonably high, every person who is a member thereof (for definition of member see below), or if it is a corporation, the corporation, also, commits an offense. (Sec. 7.)

(*f*) Every person who aids, counsels, or procures the commission of an offense under this act, or the doing of an act outside of New Zealand which if done in New Zealand would be such an offense, is to be deemed to have committed such offense. (Sec. 9.)

A commercial trust is defined substantially as follows:

Any association having as one of its objects controlling or influencing the supply or demand or price of any goods in New Zealand or any part thereof, or elsewhere, or creating or maintaining a monopoly, whether complete or partial, in the supply or demand of any goods. An association includes the union of any number of persons under any agreement or trust, whether temporary or permanent, and whether legally valid or not, and whether including any scheme of organization or common management or control or not. Member of such trust includes any constituent person or agent, and in case the agent is a corporation, firm, or association, every member thereof.

The term "unreasonably high price" is defined as follows:

> For the purposes of this Act the price of any goods shall be deemed to be unreasonably high if it produces or is calculated to produce more than a fair and reasonable rate of commercial profit to the person selling or supplying, or offering to sell or supply, those goods, or to his principal, or to any commercial trust of which that person or his principal is a member, or to any member of any such commercial trust.

The offenses described above are punishable by a fine of £500 sterling, or such part thereof as the court thinks fit. The fine is made a debt to the King and can be recovered in civil action, together with costs.

In addition to the penalty of fine the Supreme Court may grant an injunction against the continuance or repetition of the offense.

The first case decided under this law, and the only one which has been noted, was Merchants' Association of New Zealand *v.* the King.[1]

The Merchants' Association of New Zealand fixed rules regarding the trading methods of its members with respect to various commodities, and in particular sugar. The Colonial Sugar Co. (Ltd.) was the only refiner of sugar in New Zealand, and produced practically all the refined sugar consumed there. After the passage of the Commercial Trusts Act in 1910 the sugar company established a scale of discounts which allowed higher discounts for larger quan-

[1] Merchants' Association of New Zealand (Inc.) et al. *v.* H. M. the King, Court of Appeal, 32 New Zealand Law Rept. 1233 (1913).

tities purchased than for smaller quantities, and was arranged to prevent merchants not belonging to the association from availing themselves of the highest rate of discount. Certain association merchants appointed one of their number to buy for them, and thus by pooling their purchases they obtained the highest rate of discount, while a nonassociation merchant buying smaller quantities was refused as large a discount. The evidence also showed that the association merchants obtained control of the distribution of sugar in New Zealand and kept prices at a higher level than they would otherwise have been. The sugar company, the association, and certain association merchants were made defendants in a criminal suit under the Commercial Trusts Act, 1910. The court held (1) that all of the defendants were guilty of an offense under section 5 which forbids conspiracy to monopolize.contrary to the public interest, etc.; (2) that the sugar company was guilty under section 3 with respect to the prohibition against giving rebates, because the person receiving them is a member of a commercial trust, etc.; (3) that the sugar company was also guilty under section 4 with respect to the prohibition against refusing to sell to persons who will not follow the directions of a commercial trust in the purchase or sale of goods, etc.; and (4) that the merchants' association was guilty under section 9, which forbids any person to aid or abet offenses against the act, etc. The court distinguished this New Zealand law from the Australian law (see p. 243) and said, in part (p. 1267):

In the present case the Sugar Company had clearly a monopoly in the manufacture of refined sugar in New Zealand, and practically a complete monopoly in the sale of it, as the amount of imported refined sugar so far as regards competition was negligible. The company wished to preserve that monopoly and to exclude foreign competition. It also wished to secure the co-operation of the merchants as a distributing agency. The object of the merchants was to secure the exclusive control of the sugar trade, to keep the distribution of sugar in their own hands, and to prevent competition. The company and the merchants combined to carry out their objects, and in order to carry them out committed the offences which we have already dealt with. So far as can be judged from the evidence, to carry out these objects necessarily involved the commission of these offences. If the monopoly or control sought to be obtained can only be obtained by breaches of the law it is, in our opinion, of such a nature as to be contrary to the public interest, although if it could have been obtained without breaches of the law it might not have been contrary to the public interest. Apart, however, from the above considerations, it appears to us that the monopoly or control sought to be established was of such a nature as to be contrary to the public interest. It is not necessary, as in *The Coal Vend case*, to prove an intent to control the supply or price to the detriment of the public, or to show that any detriment has happened to the public.

PATENTS, DESIGNS, AND TRADE-MARKS.—The law relating to patents, trade-marks, etc., was amended in 1908 (Act No. 140, sec. 28), and provision made for the granting of compulsory licenses in case it is

proved to the governor that (*a*) the patent is not being worked in New Zealand, or (*b*) the reasonable requirements of the public with respect to the invention can not be supplied, or (*c*) any person is prevented from working or using to the best advantage an invention of which he is possessed. The governor may order the patentee to grant licenses on such terms as he deems just under the circumstances.

Section 6. Union of South Africa.

An act of the Legislature of the Cape of Good Hope of 1907 with respect to the meat trade and an act of the Union of South Africa of 1911, relating to the post office are of interest in this connection.

THE MEAT-TRADE ACT, 1907.—The Meat-Trade Act of 1907 provides for the payment of a license fee by butchers, which is lower for those who sell meat from stock raised in South Africa than for others. It also makes the following provisions concerning restraint of trade which, however, shall become operative in the particular divisions of the colony only after proclamation by the governor:

Every act, contract, combination or conspiracy in unreasonable restraint of the trade of a butcher is hereby declared to be illegal, and every person who shall commit any such act or make any such contract or engage in such combination or conspiracy shall be guilty of a criminal offence, and subject on conviction to a penalty not exceeding £500, and in default of payment thereof to imprisonment with or without hard labour for a period not exceeding twelve months.

It is expressly provided, however, that the establishment of bona fide partnerships to carry on the business more economically, or contracts made in connection with bona fide sales to enhance the value of the property sold, shall not be regarded as illegal.

It is further provided that—

All contracts and undertakings in support of any combination the object of which is to secure the control of the sale of meat, so as to enable such combination to arbitrarily control or regulate the price thereof, shall be held to be illegal and void.

The use of threats or intimidation to compel a butcher to sell at other prices than those he was selling at when such threats or intimidation was used is also made a criminal offense.

A license issued to a butcher who has been convicted of violating the criminal prohibitions shall be canceled and not reissued within two years after conviction.

THE POST OFFICE ADMINISTRATION AND SHIPPING COMBINATIONS DISCOURAGEMENT ACT, 1911.—The governor general is forbidden by the Post Office Administration and Shipping Combinations Discouragement Act of 1911 to make ocean-mail contracts with any person who—

(1) is connected directly or indirectly with any such shipping or other combination as the Governor-General may deem detrimental to, or likely to affect adversely, South

African trade or industries; or (2) gives, offers, or promises to any person any rebate, refund, discount, or reward upon condition that such person shall ship, or in consideration of such person having shipped, goods by vessels of particular lines to the exclusion of any others.

Section 7. British India.

The Indian Contract Act of 1872 contains two sections which have been judicially interpreted with respect to restraint of trade.

Section 23 describes certain conditions under which a contract may be unlawful as follows:

SEC. 23.—The consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

The relation of public policy to contracts involving monopoly were adjudicated in a case [1] where the defendant, a municipal council, had granted to the plaintiff and another, who had released his rights to the plaintiff in consideration of a certain sum of money, the exclusive privilege of selling flesh within the limits of the municipality for one year. The court held that certain powers conferred on the municipality to issue licenses, including licenses for the sale of flesh, did not give it the power to create in advance a monopoly such as the one in question, because such power was not expressly conferred and was contrary to public policy under section 23 of the Indian Contract Act.

Section 27 of the Indian Contract Act contains certain provisions regarding contracts which restrain a person from exercising an occupation, and these have been interpreted in connection with the lawfulness of trade combinations. Section 27 reads as follows:

SEC. 27.—Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Exception 1.—One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

Exception 2.—Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership within such local limits as are referred to in the last preceding exception.

Exception 3.—Partners may agree that some one or all of them will not carry on any business, other than that of the partnership, during the continuance of the partnership.

[1] Somu Pillai *v.* Municipal Council, Mayavaram, Indian Law Rep., Madras Series, XXVIII, 1905, p. 520.

The first important case [1] was that of a trade combination formed by four cotton ginning concerns which, for a term of four years, agreed that the price of ginning should be Rs. 4–8–0 per palla of cotton, or such other price as might be agreed on, and that, in their accounts, they would charge Rs. 2–8–0 per palla to cost of ginning and the remainder of the price to profit, which profit should be divided among the parties in proportion to the number of gins they possessed. One of the parties refused to pay to the others the amounts due under the agreement as shown by the accounts and was sued for payment by one of the other parties to the agreement. The court held that the plaintiff was entitled to recover; that the only agreement sought to be enforced was the agreement to divide profits and that such an agreement was lawful.

A similar case [2] arose in connection with a combination of ice manufacturers in 1902 wherein all the ice manufacturers of Bombay agreed to carry on their business in concert until the end of 1903 and thereafter unless the agreement was terminated by notice. The agreement provided, among other things, for minimum selling prices for ice, for fixed quotas of production and sale, for restricting additions to the plant and machinery of members, and for contributions from profits on sales to a general fund or pool for division among the participants. It was provided further that if a competing ice factory should be started the agreement would be terminated. By a supplementary agreement the price of ice for certain wholesale dealings was fixed at Rs. 58 per ton, and prices were agreed on for other classes of customers, except steamers, which in no case were less than Rs. 58 per ton. A few months after this pool began operations one of the members notified the pool managers that it was advised that the agreement was void and that it would sell ice at Rs. 22–8–0 per ton, which was below the agreed prices. Suit was brought by other members of the pool which prayed the court to restrain the sale of ice contrary to the terms of the agreement, to order the payments due under the agreement to the pool fund, to award damages, etc. The only issue which requires attention here was the defense set up that the agreement was void. The court held, per Jenkins, C. J., that so far as the obligation to contribute to the pool fund was concerned, which was the only issue the court needed to decide, there was no unlawful restraint of trade within the meaning of section 27 of the Indian Contract Act, nor was it void as contrary to public policy under section 23 of the same act, because so far as such restraints of trade are concerned those which are contrary to public policy are covered by section 27. The court held further that the

[1] Haribhai Maneklal v. Sharafali Isabji, Indian Law Rep., Bombay Series, Vol. XXII, 1898, p. 861.
[2] Fraser & Co. v. Bombay Ice Manufacturing Co., Indian Law Rep., Bombay Series, XXIX, 1905, p. 107.

only relief which could be given under the circumstances of the case was damages for the nonpayment of contributions to the pool fund.

Section 8. Egypt.

The Egyptian Penal Code for mixed tribunals[1] in article 308 provides a penalty against interfering with free competition in auctions almost identical with article 412 of the French Penal Code (see p. 272), and in articles 309 and 310 combinations which tend to effect changes in the prices of commodities or securities are prohibited in practically the same terms as in articles 419 and 420, respectively, of the French Penal Code. (See pp. 269–270.)

Section 9. Germany.

There are no general laws specifically applicable to trusts or combinations (cartels) in Germany, except with respect to bidding on public contracts, but some of the general legislation, as well as certain local laws and acts affecting specific industries, are of importance.

CRIMINAL LAW.—The Penal Code for the German Empire[2] contains no provisions specifically affecting cartels. Of some interest in this connection is section 253 of the Penal Code, which prohibits extortion. The following case illustrates the application of this law where a cartel was involved: A powder manufacturing combination refused to supply dealers who failed to patronize it exclusively, and threatened to discontinue the supply of a customer who had purchased such goods from a competitor. The Imperial Court condemned the powder combination under this section of the Penal Code.[3]

In section 302e of the Penal Code penalties are imposed on those who exploit the necessity, thoughtlessness, or inexperience of another in order to obtain for themselves or a third party a pecuniary advantage which is strikingly disproportional to the service rendered.

The criminal law of Alsace-Lorraine, however, preserves the prohibitions of articles 419 and 420 of the French Penal Code (see pp. 269–270), but no cases appear to have occurred of the application of this law. Furthermore, the States of the German Empire have supplementary criminal laws of local application, and several of them have laws prohibiting agreements to avoid competition in bidding on public contracts, as, for example, Prussia, Hessen, and Alsace-Lorraine. The Prussian Criminal Code of April 14, 1851, section 270, provides as follows:

Whoever by force or threats or by the promise or guarantee of an advantage, restrains another from bidding or overbidding in an auction undertaken by public authorities

[1] Code Pénal des Tribunaux Mixtes; Codes des Tribunaux Mixtes d'Egypte, Alexandrie, 1907.
[2] Strafgesetzbuch für das deutsche Reich.
[3] Urt. v. 29. Nov. 1900, Entscheidungen des Reichsgerichts in Strafsachen, Bd. 34, S. 15 ff.

or officials, whether the same relates to sales, leases, delivery of goods, enterprises or business of any kind, shall be punishable with a fine up to three hundred thalers or with imprisonment up to six months.

Similar provisions are found in the Police Criminal Law of Hessen, article 381 (Oct. 30, 1855, and Oct. 10, 1871), and in article 412 of the Criminal Code of Alsace-Lorraine (cf. French Penal Code, art. 412). These prohibitions have been applied and interpreted by the courts in various cases.[1]

According to statements in the press [2] the German Government shortly prior to the war contemplated applying another section of the Penal Code in connection with an investigation of the relations of a certain tobacco and cigarette dealer in Dresden with the British-American Tobacco Co. The provisions of the section in question, namely, section 128, are as follows: [3]

Participation in a society whose existence, constitution or purpose shall be kept secret from the Government, or in which is promised obedience to an unknown superior, or unconditional obedience to a known superior, makes the members punishable with imprisonment up to six months and the promoters and leaders of the society with imprisonment from one month to one year.

It also provides in the case of officials for the loss of capacity to hold office for a period of from one to five years.

CIVIL LAW.—While the general civil law of the German Empire does not contain any provisions expressly governing the legality of combinations, certain sections of the Industrial Code and of the Civil Code have occasional applicability. The civil law also contains provisions which are of importance in determining the legality of particular practices of cartels; these are found chiefly in the Civil Code, but also in the Law against Unfair Competition.

The chief provisions of the law which are of significance with respect to the legality of combinations are section 1 of the Industrial Code and section 138 of the Civil Code.

In section 1 of the Industrial Code the following provision is made:

The pursuit of an industry is permitted to everyone, in so far as exceptions or limitations are not imposed or permitted in this law.[4]

That this provision of the law does not render invalid the existence of a combination was decided in the case of the book dealers' cartel, referred to below. (See p. 259.) A more important decision was that made with regard to the Saxon wood-pulp cartel which apportioned the output of members of the combination and sold their products through a common selling agency.[5] In a suit to enforce the agree-

[1] Denkschrift über das Kartellwesen, Bearbeitet im Reichsamt des Innern, II. Teil, Berlin, 1906, pp. 28-30. Local authorities, moreover, often provide against combinations in bidding.

[2] Frankfurter Zeitung, Jan. 22, 1914.

[3] Strafgesetzbuch für das deutsche Reich.

[4] Gewerbe-Ordnung.

[5] Urt. v. 4. Feb. 1897, Entsch. d. R. Ger. in Civilsachen, Bd. 38, S. 155 ff.

ment the defense was made that it was invalid as contrary to section 1 of the Industrial Code. The Imperial Court upheld the agreement and said (p. 156):

> This objection can not, however, be regarded as well founded. The complainant association is established, as expressly stated in the statutes, and without dispute between the parties, in order to prevent for the future a destructive competition between the Saxon wood-pulp manufacturers, and to make possible the attainment of higher prices than would be reached by unrestricted competition.

Examining this matter from the point of view of public policy the court went on to say (p. 157):

> If in any branch of industry the prices of products sink too low and if the thriving operation of the industry is thereby made impossible or endangered, then the crisis which occurs is destructive not only for individuals, but also for the social economy in general, and it lies, therefore, in the interest of the whole community that unduly low prices in a branch of industry shall not permanently exist.

While the court concluded, therefore, that such combination agreements were not invalid in principle, it proceeded to consider, nevertheless, whether they might not be invalid under certain circumstances, and stated the possible exceptions as follows (p. 158):

> Agreements of the kind under consideration can therefore be questioned from the standpoint of the protection of the general interest through the freedom of industry only if particular circumstances give rise to objections in individual cases, especially if it is evident that the creation of an actual monopoly and the usurious exploitation of the consumers is aimed at, or these results are actually brought about by the agreements and arrangements made.

It was claimed in this case, also, that another section of the Industrial Code, namely, section 152, which provides that participants in a union or agreement to raise wages or improve the conditions of labor may freely withdraw therefrom, enabled a member of a cartel to refuse to fulfill his agreement, but the court rejected this view.

The Civil Code, in section 138, provides in the first paragraph as follows:

> A jural act which is repugnant to good morals is void.[1]

An additional paragraph of this section states particular instances of its application similar to those noted above (p. 257) in connection with section 302e of the Penal Code.

Before the enactment of this code efforts were made to have the courts annul such agreements under substantially similar provisions of prior codes. The Imperial Court, in holding as lawful a book-dealers' cartel which fixed rebates or discounts, declared that the claim that it was an infraction of good morals was not well founded. The court made a distinction between speculative "rings" for the pur-

[1] Bürgerliches Gesetzbuch, sec. 138. For "Rechtsgeschäft," here rendered "jural act," there is no precise English equivalent; it includes all acts by which persons endeavor to produce legal results—contracts, conveyances, etc. The phrase translated "good morals" is "die guten Sitten," which is itself a translation of the Latin "boni mores."

pose of controlling the market and destroying the free activity of economic forces and the associations of persons in the same trade for the bona fide purpose of preserving a living basis by preventing the depreciation of commodities and other disadvantages arising from price cutting.[1]

In an earlier case, in the highest court in Bavaria, the court held that a combination of tile manufacturers which fixed prices and limited production was not against good morals, but, on the contrary, both a valid and a prudent business arrangement.[2]

The German Imperial Court has almost invariably, indeed, upheld ordinary combination agreements or cartels. Particular reference may be made to a decision affirming the validity of the Rhenish-Westphalian Coal Syndicate agreement,[3] one of the most powerful cartels in Europe, which regulates the output of its members and sells the coal through a common selling company.

A remarkable case was decided recently by the Imperial Court, in which the principal facts were substantially as follows:[4] The Deutsche-Petroleum Verkaufs-Gesellschaft, plaintiff, a subsidiary of the Europäische Petroleum Union, and the Deutsch-Amerikanische Petroleum Gesellschaft, defendant (a Standard Oil concern), both companies being organized in Germany, made a pool agreement in London on May 27, 1907, to the following effect: The plaintiff company gave to the Standard concern complete control over its equipment, product, and selling force, to manage the sale of oil in Germany, with the power to fix the prices of oil, to appoint and dismiss departmental managers and other employees, and to increase or reduce the equipment, including the sale thereof to the Standard concern or others at the book value less stipulated rates of depreciation. The plaintiff company also agreed that its directors and stockholders would make such by-laws and resolutions necessary for the carrying out of the agreement as might be demanded, under penalty of a fine for each refusal. It also agreed to maintain its capital stock at not less than 6,000,000 marks. The plaintiff company was to keep its general organization and to have "independent" employees for conducting the financial side of its business, but such officials were to be paid by the Standard concern and were not to be allowed to interfere in the commercial side of the business. The Standard concern only was to have the right to admit other members to the pool. Disputes as to the meaning of the agreement were to be determined by an arbitration court.

The plaintiff company in 1912 sought to have this agreement annulled by the courts, and it was finally decided in the Imperial Court

[1] Urt. v. 25. Juni 1890, Entsch. d. R Ger. in Civilsachen, Bd. 28, S. 238 ff.

[2] Urt. d. O. L. G. f. Bayern v. 7. April 1888; Seuffert's Archiv, Bd. 44, Nr. 13. p. 16.

[3] Gewerkschaft d. Zeche ver. Hannibal w. Rheinisch-Westfälisches Kohlensyndikat. Urt. v. 19. Feb. 1901; Entsch. d. R Ger. in Civilsachen, Bd. 48, S. 306.

[4] Urt. v. 27. Mai 1913, Entsch. d. R Ger. in Civilsachen, Bd. 82, S. 308 ff.

to be invalid under article 138 of the Civil Code. The court said in part:

> Such a gagging of one party by the other, such a complete subjection to the will of the opposite party, contradicts the views of morality prevailing in Germany. An agreement which contains such provisions, and especially as the kernel of the whole arrangement, must be regarded as null in its full extent according to section 138, paragraph 1, of the Civil Code.
>
> * * * * * * *
>
> A company can dissolve itself, but it can not put itself in wardship any more than a natural person can.

It is noteworthy that in this case the pooling agreement was not declared invalid because the public was injuriously affected, but because it was regarded as unfair between the parties and ultra vires. The public interest is not regarded as injuriously affected, apparently, unless the combination is in the nature of a speculative ring to control the market (see p. 259) or unless it aims at or results in a complete monopoly and the usurious exploitation of consumers. (See p. 259.)

The question has also arisen in the German courts whether agreements to prevent competition in public auctions are contra bonos mores. The Imperial Court has declared that they are not necessarily so,[1] but nevertheless such agreements have been sometimes declared void.[2]

Another provision of the Civil Code may be noticed which is of interest in connection with the local criminal prohibitions against combinations at public auctions. (See p. 257.) Section 134 provides:

> A jural act, which is repugnant to a legal prohibition, is void, if the law does not provide otherwise.

In the case of an agreement by which a person refrained from bidding at a public auction contrary to section 270 of the Prussian Criminal Code, the Imperial Court declared that the agreement itself was not necessarily void under article 134 of the Civil Code.[3]

The most important rules against unfair competition which have been applied to the practices of combinations are found in the Civil Code. There is also a special Law against Unfair Competition, enacted in 1909 (see Chap. X, p. 623), but only a few of its provisions are of much significance with relation to combinations, and no practical application of them by the courts has been noted in this connection.[4]

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[1] Urt. v. 11. Juli 1904, Entsch. d. R Ger. in Civilsachen Bd. 58, S. 393 ff.

[2] Urt. v. 17. Nov. 1891, Juristische Zeitschrift für Elsass-Lothringen, Bd. 17, S. 139 ff. Cited in Denkschrift ü. d. Kartellwesen, Berlin, 1906, II. Teil, pp. 10—11.

[3] Urt. v. 17. März 1905, Entsch. d. R Ger. in Civilsachen, Bd. 60, S. 273 ff.

[4] Subsequent to the issue date of this report (Mar. 15, 1915) the Imperial Court held that a company which incorrectly advertised itself as independent of the "Trust" for purposes of competition, had violated secs. 1 and 3 of the Law against Unfair Competition. (See p. 659.) Urt. v. 30. März 1915, Monatsschrift für Handelsrecht u. Bankwesen, Juni 1915, p. 126.

The Civil Code, under the title of "Unpermitted dealings," contains numerous sections, of which the most important in the present connection are the first part of section 823 and, especially, section 826, which are as follows:

SEC. 823. Whoever, contrary to law, intentionally or negligently injures the life, body, health, freedom, property or any other right of another, is bound to such other for compensation of the injury arising therefrom.

SEC. 826. Whoever in a manner repugnant to good morals intentionally inflicts an injury upon another is bound to such other for compensation of the injury.

Both of these provisions have been considered by the courts in connection with practices that are often found among cartels.

An illustration of the application of section 823 is found in the case of an association of medical practitioners which maintained rules prohibiting members from medical consultation with certain other practitioners. A member physician who conducted a private clinic was expelled from the association for consulting with a homeopathic physician, and other members were warned against consulting with the said member. The physician claimed to be injured thereby under section 823 of the Civil Code. The court held that the said warning issued to other members was in violation of this section of the law, the question of civil liability being referred to the lower court for further evidence and consideration.[1]

An illustration of the application of section 826 is found in the following case: A steamship company tried to force a competing group of sailing boats out of a certain trade by refusing to accept shipments at the ordinary rates from a large shipper if he persisted in patronizing the competing sailing boats. The shipper brought an action to compel the steamship company to abandon such discrimination. The Imperial Court sustained this claim and said, in part (pp. 119, 125):[2]

* * * section 826 is adapted and also intended by the legislator to provide a protection against unfair treatment in a comprehensive manner, particularly for business intercourse, in so far as provision is not made through special laws. * * *

Especially also against abuse of the freedom of industry through avaricious exploitation or through the overpowering of others, section 826 of the Civil Code affords protection.

The standard of morals applicable under section 826 the court stated to be the sense of propriety of right-minded persons, and in commercial matters the views of honorable merchants.

Another illustration of the application of section 826 is found in the following case: A cartel was formed among goldbeaters in a certain district to regulate production and prices, which made an agreement with an organized union of workpeople in that branch of industry whereby the latter were to receive certain wages, etc., and were to

[1] Urt. v. 6. März 1902, Entsch. d. R Ger. in Civilsachen, Bd. 51, S. 66 ff.

[2] Urt. v. 11. April 1901, Entsch. d. R Ger. in Civilsachen, Bd. 48, S. 114 ff.

abstain from accepting employment in concerns not comprehended in this agreement, while no new concerns were to be admitted thereto during the first year (1902). Two goldbeaters who had been in the business before, but who had ceased to operate on account of a strike due to a reduction of wages, recommenced business in that district in 1902 and sought admission into the cartel and the labor agreement. The workpeople were willing to call the strike off, but were induced by the goldbeaters' cartel to continue it for another year. The two goldbeaters brought an action against certain directing members of the cartel under section 826 of the Civil Code. While certain matters relating to the liability of the defendants were not clear, the court gave an opinion on the applicability of section 826 of the Civil Code, as follows (p. 105):

> According to these unimpeachable statements of fact in the judgment on appeal, no doubt can exist that by the said dealings injury was intentionally done to the plaintiffs through representatives of the employers, in a manner contrary to good morals.[1]

Prior to the introduction of the present Civil Code, namely, on May 27, 1896, a law against unfair competition was enacted which was subsequently revised and amplified by the Law against Unfair Competition of June 7, 1909.[2] This law prohibits various specific practices, which are not particularly characteristic of combinations, and affords both civil and criminal remedies. (See p. 623.) The most important as well as the most comprehensive provision of the law is the first section, which reads as follows:

> Whoever in business affairs, for the purpose of competition, commits acts which are repugnant to good morals may be subject to an action to desist therefrom and to pay damages.

This section is similar to section 826 of the Civil Code, but it is restricted to business dealings. (See p. 648.)

SPECIAL LAWS REGARDING PARTICULAR INDUSTRIES.—A remarkable feature of German policy with regard to combinations is their direct encouragement in a few particular instances.

The chief instance of present interest is the imperial law regarding potash, which is practically all produced in Germany at the present time, and in which industry several German States, and especially Prussia and Anhalt, are directly engaged. Until 1910 this industry was practically monopolized by a cartel in which both of these two States were members, and in which the Prussian mining officials had a powerful influence.

By the Law Concerning the Sale of Potash,[3] of May 25, 1910, the production, sale, and prices were regulated. The principal provisions are as follows: (1) Potash salts can be sold by the owners of

[1] Urt. v. 2. Feb. 1905, Entsch. d. R Ger. in Civilsachen, Bd. 60, S. 94 ff.

[2] Gesetz gegen den unlauteren Wettbewerb, v. 7. Juni 1909. Reichsgesetzblatt, 1909, p. 499.

[3] Gesetz über den Absatz von Kalisalzen, v. 25. Mai 1910; Reichsgesetzblatt, 1910, p. 775. A translation of this law is given in Exhibit D of this report. See p. 770.

the potash mines only as provided by law; (2) sales for export can be made only by potash-mining companies; (3) the maximum quantity to be sold and the part to be sold for export is fixed by a central administrative agency; (4) the quota of each producer is determined by this central agency, and is the same both for domestic and export sales; a failure to participate to full quota in domestic sales operates to reduce the export quota; (5) the granting of quotas for new mines as they are opened by the mining companies is allowed and regulated (this of course reduces the quotas of existing mines); (6) the prices of domestic sales are fixed in the law, but may be changed by the Government from time to time as provided; (7) the prices of export sales must not be less than domestic prices; (8) a heavy tax is levied on excess sales; (9) heavy penalties are provided for defrauding the Government of the tax on excess sales and for other specified violations of the law; (10) certain modifications are permitted with respect to the prices of potash obtained under contracts made before a certain date, while certain other contracts having effect over a long term of years are declared invalid.

The last-mentioned provisions relate to certain business and international complications which are not of importance in this connection.

The general purpose of the law was to regulate production and prices so that there should not be an excessive competition between producers and a dumping of potash at low prices in export trade on the one hand, nor very high prices for the domestic consumer on the other hand. Dumping is effectually checked by the system of allotting and dividing domestic and export sales and taxing heavily any excess sales. Low prices in the domestic market are established by a direct fixing of the price. Export sales are generally made at higher prices than domestic sales, but the export prices are not uniform.[1] The prevention of excessive competition between the producers has apparently not succeeded; instead, there has been an extraordinarily large development of new mines, and with the limitation of total output this has resulted in reducing the quota of each mine and increasing, it is said, the costs of mining the potash. It is generally reported that the Government contemplates further legislation to restrict the opening of new mines, but that the private companies are opposed to this. As was expected by the Government, the enactment of this law facilitated the reestablishment of the potash cartel, in which nearly all mining companies participate, including the States of Prussia and Anhalt. In the original draft of the bill it was planned to establish a cartel by law and to compel all mining companies to become members thereof.

[1] Verhandlungen der vom K. K. Handelsministerium veranstalteten Kartell Enquête, Wien, 2. Juli 1912, IX, p. 92.

While the potash law is an exceptional one, Germany has also in a few other cases enacted revenue laws which, by discriminating in favor of concerns already operating, have encouraged the formation of cartels. The industries which have been thus affected are (*a*) spirits, (*b*) beer, and (*c*) matches.[1]

Notwithstanding the peculiar legislation with regard to particular industries just discussed, it is important to emphasize the fact that the German law regarding combinations is primarily one of free contract, and the general attitude of the public administration toward cartels is laissez faire. Administrative intervention in the management of cartels, or to counteract their activities, is of rare occurrence.

Section 10. Austria.

There are no criminal laws against industrial combinations or cartels in Austria, but they are invalid under the civil law.

The Penal Code of 1852, section 479, prohibited agreements among manufacturers, etc., to raise the price of a commodity to the disadvantage of the public, or to cause a scarcity thereof, etc., but this was repealed in 1870. The "coalition" law of April 7, 1870, provides in the second section that agreements of employers through shutdowns or lockouts to reduce wages, etc., or of employees through strikes to increase wages, etc., are null and void. In the third section the attempt to carry out such agreements through intimidation or force is made criminally punishable. The fourth section reads as follows:[2]

SEC. 4. The provisions contained in sections 2 and 3 are applicable also to agreements of manufacturers for the purpose of raising the price of a commodity to the disadvantage of the public.

Thus, cartel agreements are void at the civil law. Under the rules of civil procedure prevailing in Austria prior to 1895 it was possible to make such agreements effective for all practical purposes by providing for a private arbitration to enforce the agreement. Such an arbitration decision could not be appealed from except in case of fraud.[3] In 1895, however, a new Code of Procedure was adopted which provided that the decisions of such an arbitration are inoperative if "repugnant to compulsory rules of law," and it is further provided

[1] Reichsgesetzblatt, 1909; Branntweinsteuergesetz vom 15. Juli 1909, S. 661; Gesetz wegen Aenderung des Brausteuergesetzes vom 15. Juli 1909, S. 695; Gesetz betreffend Aenderung im Finanzwesen vom 15. Juli 1909, S. 757. Mention may also be made of the German Southwest African diamond régie under which arrangements exist between the Government and the producers of diamonds for marketing the output, etc. See Demuth, Der Diamantenmarkt, Karlsruhe, i. B. 1913, p. 76. It should be noted, also, that the Government shortly before the war introduced a bill for establishing a monopoly in the wholesale trade in illuminating oil from petroleum, to be exercised by a company whose capital stock was to be subscribed to both by the Government and by private interests, but in the management of which the Government was to have the controlling influence. The prices to be charged by this company, as well as the profits to be divided, were to be regulated according to the provisions of this bill.

[2] Gesetz v. 7. Apr. 1870; Reichsgesetzblatt für die im Reichsrate vertretenen Königreiche und Länder, Jahrg. 1870.

[3] Allgemeine Gerichtsordnung, art. 273.

that the parties can not, in a legal sense, renounce their right of appeal to the courts in such cases.[1]

The meaning of the law of 1870 regarding cartel agreements has been frequently interpreted by the courts. A cartel of oleum producers, organized in 1887 for the sale of oleum, chiefly in the export trade, on breach of the agreement brought an action for damages. The suit was defended on the ground that the agreement was not enforceable under the law of April 7, 1870. The highest court in Austria held that the agreement was invalid and that no claim for damages could be allowed.[2] The decision turned chiefly on the definitions of the words in the law. The word translated above as "manufacturers" (Gewerbsleute) was held to include not only craftsmen, but also factory producers, the court pointing out that the word was so used in various laws and that there was no reason to suppose that the legislator had intended to limit it in this instance.

Another case related to a combination of chalk producers who by agreement had established a common selling bureau in Vienna. The court held that the agreement was void and that it was not necessary to show that there had been an actual advance in prices, as such a result might be presumed at law from the nature of the agreement, which provided for restricting the output. The court also defined the term "commodity" (Ware) to include not only finished goods used in ordinary consumption, but also unfinished goods used further in manufacture.[3]

A recent case, for which a full report of the decision is given in the public press, was as follows:[4] A number of reinforced concrete construction concerns formed an association for regulating their bids on building contracts, under a written agreement, which provided among other things that they should inform each other concerning undertakings on which they proposed to bid, and should come to an agreement as to the manner in which the bids were to be made in each case; that in certain cases contributions should be made to a common fund by the concern which was awarded the undertaking; that violations of the agreement should be punished by fines; and that arbitration should be resorted to for the determination of disputed matters. A concern which had been awarded a certain undertaking shortly afterwards withdrew from the association and refused to pay the contribution in respect thereto required by the agreement, on the ground

[1] Civilprozessordnung, v. 1. Aug. 1895, secs. 595 and 598. In certain cases the validity of agreements with cartels can be attacked by the parties who purchase from them: see Einführungsgesetz, art. XXIII, of the Civilprozessordnung, and Einführungsgesetz, art. XXX, of the Exekutionsordnung.

[2] Entsch. v. 20. Jan. 1898. No. 242. Sammlung v. Civilrechtlichen Entsch. des K. K. Obersten Gerichtshofes, Bd. XXXV, S. 10.

[3] Entsch. v. 6. Apr. 1899. No. 3419. Sammlung v. Civilrechtlichen Entsch. des K. K. Obersten Gerichtshofes, Bd. XXXVI, S. 199.

[4] P. Betonbauunternehmung, w. Ed. A. u. Konsorten. Entsch. d. K. K. Obersten Gerichtshofes vom 10. Juni 1913; reprinted in Kartell-Rundschau, August 1913, pp. 623, 631.

that the contract was executed after withdrawal. An arbitration proceeding to which the said concern refused to be a party adjudged a fine. The case was appealed to the highest court which held that the lower court was right in declaring that the arbitration court could not disregard the provisions of sections 2 and 4 of the law of April 7, 1870, and further that it was evident from the by-laws of the association regulating bidding that the agreement was invalid under that law, as well as from the fact that the damages claimed were based on the amount by which the price of the undertaking was increased in consequence of the cartel.

In 1907 five manufacturing companies made an agreement regarding selling prices and terms, including minimum prices for sales in Austria-Hungary. The court held that the agreement was invalid under the coalition law, that it was not material whether prices had actually been advanced or not, that the intent to advance prices appeared from the character of the agreement, that the limitation of the agreement with respect to time and space did not relieve it of illegality, that the number of participants was immaterial, and that the law related to commodities in general and not merely to articles of necessity.[1]

While the inferior courts in Austria have in several instances given decisions in favor of the legality of such combinations, the judgments of the highest court appear to have been almost invariably against them.

CIVIL LAW.—The General Civil Code of Austria[2] contains two provisions which are of interest in this connection. Article 26 declares that unpermitted companies as such have no rights, either against their members or against others, and that they are incapable of acquiring rights. Unpermitted companies are defined as those which are forbidden by the political laws, or which are clearly repugnant to security, public order, or good morals. Article 878 is to the effect that whatever can not be done, or whatever is actually impossible or unpermitted, can not be the subject of a valid agreement. Some writers hold that these provisions would have application to cartel agreements in certain cases,[3] but they do not appear to have been applied by the courts.

According to an official German publication, a decree (Hofkanzleidekret) of August 27, 1838, declares that agreements to prevent competition in bidding at public auctions are invalid.[4] The same authority states that a cartel having the form of an association can be dissolved under section 6 of the Law of Associations of November 15, 1867, as being contrary to law, while the organization of a cartel

[1] Entsch. v. 7. Mai 1912; Die Praxis des Obersten Gerichtshofes, No. 72, Bd. 14, p. 124.
[2] Allgemeines Bürgerliches Gesetzbuch.
[3] Pick: Praktische Fragen des oesterreichischen Kartellrechtes; Wien, 1913, p. 31 et seq.
[4] Denkschrift über das Kartellwesen; Berlin, 1908, IV. Teil, p. 7.

in the form of a stock company could be prevented under section 14 of the Imperial Patent of November 26, 1852, as not in accordance with the public interest. A combination of dextrin manufacturers organized an association with limited liability and sought to obtain official registration. This was refused by the registry court on the ground that the association was not of the kind contemplated by the law, but a combination in the sense of section 4 of the Law of April 7, 1870. This decision was affirmed on appeal by the highest court (Sept. 12, 1906).[1]

Several serious efforts to enact general laws controlling cartels have been made in Austria, the first bill (subsequently amended) being introduced in 1897.[2] In 1903 a radical departure was taken in a law concerning the sugar industry which fixed the quota of each refinery and was intended to facilitate the formation of a cartel.[3] As the governing commission of the Brussels International Sugar Convention held this arrangement to conflict with the provisions of the treaty in such a manner as to necessitate the imposition of a surtax, this law was repealed in the same year. As an accompaniment to this law, a bill was introduced prohibiting cartel agreements concerning the division of the market in the purchase of sugar beets; but although considered in several subsequent legislative sessions, it has not been enacted into law.[4]

Section 11. Hungary.

There are no provisions of law in Hungary which specially affect combinations, except section 128 of the Criminal Code[5] concerning Minor Offenses of 1879, which reads as follows:

> Whoever in consequence of agreements, promises of participation in profit or other compensation or any advantage attempts to frustrate or to diminish the success of a public auction; further, whoever obtains on this basis a share in the profit, compensation or other advantage: shall be punished with imprisonment of not more than two months and a fine of not more than three hundred gulden.

The courts, apparently on the basis of this law, have repeatedly held that combinations or cartels which aim to exclude competition to the disadvantage of the public are null and void.[6]

In a recent case, however, the highest court in Hungary took a different position. No official report of this case has been secured,

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[1] Adler u. Clemens, Sammlung handelsrechtlicher Entscheidungen, Bd. XIII, Nr. 2597, S. 427.

[2] Regierungsvorlage, Gesetz v.— über Cartelle in Beziehung auf Verbrauchsgegenstände, u. s. w. 154 der Beilagen zu den Stenogr. Protokollen des Abgeordnetenhauses, XIV Sess., 1898.

[3] Gesetz vom 31. Jänner, 1903, betreffend die Regelung der individuellen Vertheilung des Zuckercontingentes, Reichsgesetzblatt, 1903, S. 53.

[4] Regierungsvorlage, Gesetz v.— betreffend das Verbot der Rübenrayonnirung und die Lieferung der zur Zuckererzeugung nöthigen Rübe, 1678 der Beilagen zu den Stenogr. Protokollen des Abgeordnetenhauses, XVII Sess., 1903.

[5] Ungarisches Strafgesetzbuch über Uebertretungen, 12–14, Juni 1879.

[6] Denkschrift über das Kartellwesen, Berlin, 1908, IV. Teil, p. 12; Baumgarten und Meszlény, Kartelle und Trusts, Berlin, 1906, pp. 281–283.

but, according to a statement in the public press, the facts and decision of the court were as follows:[1] Several firms of contractors made an agreement regulating their participation in bidding on public contracts, including provisions as to prices and conditions, and penalties for breach of the agreement. A party to the agreement who disregarded it was fined, and on refusal to pay the penalty was sued for payment. The defense set up was that the agreement was invalid. Judgment was given against the defendant and on appeal was upheld by the highest court. The court said in part:

If those engaged in a branch of business combine to hinder the offer of cut prices which endanger the economical operation of the industry in order thereby to maintain a reasonable price for their work, an agreement pursuing such an end, and not fixed for too long a period (it was for five years in this case) can be regarded as inconsistent neither with the interest of the participants nor with that of the public nor as repugnant to good mora'e. Persistently low prices developed in consequence of unhealthy competition, for instance, can result in a crisis in the branch of industry in question. A combination which seeks to avoid a crisis injurious both to the contractor and to the party employing him serves also the interest of the public. Such a combination, which furthermore is a proper factor directed to the maintenance of a branch of industry and whose reason for existence is not based on the purpose of frustrating or diminishing the results of public biddings, does not comprise the active elements of a dealing repugnant to section 128 Article XL of the Law of 1879.

It appears that adjudication of the validity of cartel agreements can be avoided by providing that disputed matters shall be determined by private arbitration, the decisions of such a tribunal not being subject to review by the courts.[2]

It is also stated that according to certain administrative ordinances [3] it is possible for the governmental authorities in certain cases to disallow the acts of associations or even to suspend or dissolve associations whose by-laws conflict with such ordinances or which endanger the general interests or the pecuniary interests of members thereof.[4]

Section 12. France.

In France both the criminal and the civil law contain provisions which affect the legal existence of industrial combinations. These laws are chiefly found in the general codes which were enacted shortly after the Revolution.

CRIMINAL LAW.—The principal provision of the Penal Code against cartels is found in article 419, namely:

ART. 419. All those who by false or calumnious reports sown by design in the community, by offers of prices higher than those asked by the vendors themselves, by union or coalition among the principal possessors of the same merchandise or commodity not to sell or to sell at a certain price only, or by whatever fraudulent ways

[1] Pester Lloyd, Jan. 17, 1912.
[2] Baumgarten und Meszlény, op. cit., p. 283.
[3] Verordnungen des Ministers des Innern; 29. April 1873, 2. Mai 1875, u. 26. Feb. 1898.
[4] Baumgarten und Meszlény, op. cit., p. 284.

and means, shall have effected the advance or decline of the prices of commodities or merchandise or of public securities above or below the prices which the natural and free competition of trade would have fixed, shall be punished with imprisonment of one month at least or of one year at most and with a fine of five hundred francs to ten thousand francs. The culprits may, further, be placed by decree or judgment under the surveillance of the superior police during two years at least and five years at most.

Article 420 of the same code provides heavier penalties if the commodities are breadstuffs, bread, or wine or other potables.[1]

Article 419 of the Penal Code has been frequently applied to industrial combinations or cartels. One of the earliest cases, decided in 1838, was as follows:

Certain soda manufacturers of Marseille combined to sell all their output through one agent, who took the precaution of leasing six factories not then in operation for the purpose of preventing competition. Prices were advanced for the finished product, although the price of the raw material declined. The highest court in France declared that this combination was within the prohibition of article 419.[2]

In another early case the same court declared that a consolidation of competitors into a single company was not an illegal coalition under article 419, because that article contemplated a plurality of persons which did not exist in a single juristic person (personne morale).[3]

In 1870 a combination was made of all the important manufacturers of iodine, who agreed to divide the field which supplied the raw material and to fix the quantities to be purchased in each, and the prices to be paid therefor; they agreed, further, to dispose of the entire output of the manufactured product through a syndicate which fixed the prices and other conditions of sale. The court held this agreement to be in violation of article 419 of the Penal Code as well as invalid under the civil law,[4] and said in part (p. 493):

It results from these statements of fact and conclusions that the agreements in litigation have organized between the principal manufacturers of iodine and the defendants a coalition tending to give to the merchandise prices above or below the course which the free and natural competition of commerce would have determined. Whence it follows that in declaring them null and of no effect, the decree which is attacked, far from violating the articles invoked in the appeal, has only made a just application of Art. 419 of the Criminal Code and 1133 of the Civil Code.

One of the most interesting and important cases which shows the later tendency of the courts was that of a combination of producers, having about two-thirds of the phosphate production of the Somme district, who agreed to apportion and limit their output and to fix selling prices. The court in consideration of the fact that

[1] Code Pénal, arts. 419, 420. The provisions of the last sentence in the section quoted above appear to have been abrogated by a law of May 27, 1885.

[2] Mille et autres fabricants de soude de Marseille c. Ministère public, Cour de Cassation, 31 août, 1838; Journal du Palais, 1838, p. 391.

[3] Bulletin des arrêts de la Cour de Cassation Criminelle, du 25 janvier, 1838, p. 40.

[4] Cournerie c. Pellieux et Mazé-Launay, Cour de Cassation, 11 février 1879; Journal du Palais, 1879, p. 490.

the combination did not include more than two-thirds of the production of the Somme district, and that there was competition from producers elsewhere in France, as well as in Belgium and other countries, held that the combination did not comprise the principal producers within the meaning of article 419.[1]

A case of world-wide notoriety was that of the Secrétan copper corner of 1887–1889. Secrétan attempted a corner in copper by making individual contracts of purchase with producers in various parts of the world, who knew his purpose and expected to profit by his operations. No agreement was made, however, as to the price at which Secrétan should sell the copper. The court stated that in all respects but one the scheme came within the reach of article 419, the defect being that Secrétan's selling price was not fixed. Hence, the court held that the criminal law was not violated, although the agreements themselves (see p. 272) were invalid under the Civil Code.[2]

A more recent case was a combination of manufacturers in an "association with a collective name" which was alleged to have been formed to suppress all competition among the lime producers of St. Astier. The defendants claimed that it was a legal association, but the lower court held it to be contrary to article 419 of the Penal Code, because it aimed to fix a uniform price throughout the greater part of France.[3]

On March 21, 1884, an act was passed, entitled "Law regarding the establishment of professional syndicates." Article 2 provides that they may be established freely without authorization of the Government. Article 3 of this law provides that—

> the professional syndicates have for their exclusive purpose the study and defense of economic, industrial, commercial and agricultural interests.

It was held by some that this law repealed article 419 of the Penal Code, but in the case of a mineral-water combination which was condemned under article 419, this view was expressly denied by the court,[4] as also in the Secrétan case cited above.

French legal writers generally find the following elements in the offense described in article 419, namely, (1) plurality of agents, (2) principal holders of a commodity, (3) an artificial change in price, (4) an agreement not to sell except at a certain price.[5]

It also appears, as for example, in the phosphate case discussed above, that the courts take account of the circumstances of the case

[1] Cajot et Cie. c. Ferry et May, Cour de Paris, 14 avril, 1891; Dalloz, Jurisprudence générale, 1893, Pt. II, p. 70.

[2] Secrétan c. Min. Publ., Cour de Paris, 5 août, 1890; Dalloz, Jurisprudence générale, 1893, Pt. I., p. 56.

[3] Mallebray c. Compagnie générale des Chaux de Saint-Astier et autres, Tribunal de commerce de Périgueux, 2 juin, 1899; Journal du Palais, 1901, Pt. II, p. 226. For judgment on appeal, see p. 272.

[4] A . . . et autres c. Germain-Pernet, Cour de Lyon, 21 avril, 1896; Journal du Palais, 1896, Pt. II, p. 164.

[5] Cf. Babled; Les syndicats de producteurs et détenteurs de marchandises, Paris, 1893, pp. 134–137; Collier, Trusts, cartels, corners, Paris, 1904, pp. 461–462.

and in particular the degree of control the combination has obtained in deciding whether it has violated the law.

Besides article 419, there is another article of the Penal Code aimed at combinations, namely, article 412, which is directed at combinations to destroy competition at auctions. This article reads as follows:

ART. 412. Those who, in the sale of property, of usufruct or of lease of movable or immovable things, of an enterprise, of a furnishing, of an exploitation or of any service whatsoever, shall have hindered or disturbed the freedom of auctions or public biddings, by means of acts, force, or threats, either before or during the auctions or public biddings, shall be punished with imprisonment of fifteen days at least, and of three months at most, and with a fine of one hundred francs at least and of five thousand francs at most.

The same penalty shall apply to those who by gifts or promises, shall have kept bidders away.[1]

Condemnations have been obtained against persons combining in the manner prohibited by this section in several instances.[2]

CIVIL CODE.—Several provisions of the Civil Code have application to the question of the validity of combination agreements.

In article 1108 the essential conditions for a valid contract include a lawful ground. The chief articles affecting the validity of cartel agreements are as follows:

ART. 6. Laws which concern public order and good morals may not be set aside by particular agreements.

ART. 1131. An obligation that is without ground or is based on a false ground or an unlawful ground can have no effect.

ART. 1133. The ground is unlawful when it is prohibited by law or when it is contrary to good morals or public order.

ART. 1172. Every condition of an impossible thing, or contrary to good morals, or prohibited by law, is null and renders null the agreement which depends on it.

An illustration of the application of the foregoing articles is found in the case of the combination of manufacturers of iodine, already described (p. 270). The court on appeal declared this combination to be repugnant to article 1133 of the Civil Code, as well as to article 419 of the Penal Code.[3]

In the case of the St. Astier lime company, the facts concerning which have already been stated (see p. 271), the court on appeal decided the company to be invalid under the Civil Code;[4] the court said in part (p. 231):

* * * that it suffices to establish that the obligation of the various contracting parties had an unlawful basis and purpose; that such was the case of the members of the association criticised, since it results from the facts and circumstances of the case that the said association had been formed only in order to forestall and prevent

[1] Code Pénal, art. 412.

[2] Cour de Cassation, 15 mai 1857; Cour de Cassation, 8 janvier 1863.

[3] Cournerie c. Pellieux et Mazé-Launay, Cour de Cassation, 11 février, 1879; Journal du Palais, 1879, p. 490.

[4] Mallebray c. Compagnie générale des chaux de Saint-Astier et autres, Bordeaux, 2 janvier, 1900; Journal du Palais, 1901, Pt. II, p. 225.

the foundation at Saint Astier of competing factories, which was contrary to the principle of liberty of commerce and industry; that thus the agreement attacked ought to be annulled also by application of articles 1131 and 1133 of the Civil Code. * * *

The French courts have developed a very extensive law regarding unfair competition based on article 1382 of the Civil Code, but no applications have been noted to the practices of combinations. (See p. 569.)

SPECIAL LAWS.—In connection with the laws to prevent the destruction of competition the following provision in a French mining decree is of interest:

It is prohibited to any concessionaire of mines, of whatever nature they may be, to unite his concessions with other concessions of the same kind, by association, acquisition or in any manner, without the authorization of the Government.[1]

For violation of this decree the penalty provided is the same as for violation of article 419 of the Penal Code. (See p. 269.)

A law concerning associations enacted in 1901[2] provides in article 12 that an association chiefly composed of foreigners and having its principal place of business in a foreign country whose operations have the effect to disturb the normal conditions of the market for securities or for commodities, under conditions affected by articles 75 to 101 of the Penal Code,[3] may be dissolved, and if the directors, etc., of an association so dissolved maintain or reestablish it contrary to law, they shall be punished by fine or imprisonment. This law, however, does not appear to have had any practical application.

While certain Government monopolies have been established in France, for example, in tobacco, there do not appear to be any instances of private industrial monopolies established by law.[4]

Section 13. Italy.

The criminal laws of Italy concerning persons who artificially affect prices generally relate only to those who use fraud or violence. The civil law is substantially similar in its most pertinent sections to that of France, although interpreted more liberally. A notable feature of Italian legislation is the establishment of a compulsory cartel in the sulphur industry.

CRIMINAL LAW.—The principal provisions of the Italian Penal Code,[5] which have any clear relation to cartels, are articles 165,

[1] Décret du 23 octobre, 1852, No. 4567, art. 1.

[2] Loi relative au contrat d'association du 1 juillet, 1901.

[3] These articles relate chiefly to military matters, including materials of war.

[4] A bill was recently introduced in the Chamber of Deputies, according to the public press, which provided for the establishment of a company, in which the Government should be a stockholder, for the purpose of importing and refining petroleum, but according to the account given, monopoly powers were not to be conferred upon it. (See National Petroleum News, March, 1914, p. 52.)

[5] Codice Penale.

293, 299, and 326. Article 293, in the first paragraph, provides as follows:

ART. 293. Whoever, by spreading false reports, or by other fraudulent means, produces upon the public market or in the exchanges of commerce an increase or diminution in the rates of wages, produce, merchandise or securities, negotiable on the public markets or admitted to the lists of the exchanges, is punished with imprisonment of from three to thirty months and with a fine from five hundred to three thousand lire.

Heavier penalties are provided in a second paragraph of this section in case brokers of exchanges are guilty of a violation of the law. This differs from article 419 of the French Penal Code, in being applicable only to those who use fraudulent methods.

Similar in general character to this law is article 326 of the same code, which provides as follows:

ART. 326. Whoever, by false reports, or other fraudulent means produces a scarcity or dearness of victuals, is punished with imprisonment of from one to five years and with a fine of from five hundred to five thousand lire; to which penalty is added temporary interdiction from public offices, extended to the exercise of his profession if the culprit is a public broker.

Furthermore, interference with the freedom of industry or commerce is prohibited in article 165 as follows:

ART. 165. Whoever, by violence or threats restricts or impedes in whatever manner the freedom of industry or of commerce, is punished with imprisonment up to twenty months and with a fine of from one hundred to three thousand lire.

Article 299, which relates to bidding at auctions, provides in part as follows:

ART. 299. Whoever, by force or threats, gifts, promises, collusion or other fraudulent means impedes or disturbs the operation of public auctions or private bids for the account of the public administration, or procures the absence of the bidders, is punished with imprisonment from three to twelve months and also with a fine of one hundred lire.

Greater penalties are enforceable if the parties in question are clothed with a public office. The same section provides further:

He who for money or other utility given or promised to him or to others abstains from competing at the said auctions or private bids is punished with imprisonment up to six months or with a fine from one hundred to two thousand lire.

A condemnation under this article was upheld on appeal.[1]

CIVIL LAW.—The chief provisions of the civil law[2] in Italy regarding the relation of contracts to the principles of good morals and public order (arts. 1119 and 1122 of the Civil Code) are identical with those of France (arts. 1131 and 1133; see p. 272), and need not be repeated here.[3] Article 1104 of the Civil Code also provides that for a valid contract it is necessary that there be a lawful ground.

[1] P. M.—Colombo, Cassazione, 5 aprile, 1906; Giurisprudenza italiana, Vol. LVIII, 1906, II. p. 306.

[2] Codice Civile.

[3] See also article 12 of the "Provisions concerning the publication, interpretation, and application of the laws in general," and Art. 1160 of the Civil Code, which is similar to Art. 1172 of the French Civil Code.

The interpretation of the law, however, has been much more liberal in Italy and, apparently, cartel agreements have never been held invalid. In a case decided by the court of appeal of Naples on July 2, 1900, the right of such associations to regulate prices, etc., was expressly upheld.[1] In 1903 the court of cassation of Naples declared that a combination of producers to prevent injurious competition and to maintain remunerative prices was not invalid under the civil law.[2] The court said in part (p. 625):

> The court of appeals has properly concluded that in the Penal Code there is no prohibitive rule in this respect. Then it considered if it could find any prohibition in article 1122 of the Civil Code, a complement to article 1104 which requires as an essential to a contract a lawful ground for an obligation, which declares that the ground is unlawful when it is contrary to law, to good morals or to public order. And such a prohibition it did not find in these provisions of the code, nor is there any agreement therein forbidden by law. It has been justly observed that there is nothing unlawful in the fact of the association or union and in the assumption of obligation on the part of the associates, because this is an exercise of liberty and not a violation of the same, and because the limitation of the acts of the contracting parties is an effect characteristic of all contracts.[2]

In a more recent case where the bakers of Parma had made an agreement which expressly provided for fixing selling prices the court held that the agreement was not invalid.[3]

The Italian Civil Code contains in article 1151 a provision practically identical with that of the French civil law (art. 1382) regarding unfair competition, namely:

> ART. 1151. Whatever act of a person causes damage to another obliges him by the fault of whom it happened to compensate the damage.

An instance of the application of this provision to a monopolistic combination is found in the following case: A company called Società Salviati Jesurum C. L. was formed to combine the businesses of several dealers in Venetian specialties. The same parties organized another company called the Venice Hotels (Ltd.), which arranged to direct its patrons to the shops of the first-mentioned company. Pauly e C., a rival dealer in Venetian specialties, by means of printed advertisements, warned foreigners in Venice of the said combination and solicited their patronage, and was sued for damages by the combination. In defense the claim was made that the combination was guilty of unfair competition and that the combination in itself constituted an injury. The court held that as Pauly e C. was established after the formation of the combination the question of its monopolistic character and effects was purely academic, so

[1] Corte d'Appello, Napoli, 2 luglio, 1900; Annali della Giurisprudenza italiana, vol. 34, marzo, 1900, pp. 460–462.

[2] Algranati c. Società Viterià, Corte di cassazione, Napoli, 26 maggio, 1903; Monitore dei Tribunali, 1903, p. 625.

[3] Soc. fornai e pastai c. Finella, Tribunale di Parma, 25 febbraio 1910, Rivista di Diritto Commerciale, 1910, p. 280.

far as the defendant was concerned, and that the latter had no standing in court for the purpose of showing that the combination was contrary to the freedom of commerce.[1]

SPECIAL LAWS.—In a special law regarding emigration it is provided that in case of a combination of shipping concerns to refuse transportation to emigrants at rates approved and established by the Government their licenses shall be withdrawn.[2]

Compulsory sulphur cartel.—The sulphur industry of Sicily was for some time practically controlled by the Anglo-Sicilian Sulphur Co., but, on account of competition from the United States, that company came into difficulties and thereby a sharp crisis developed in the Sicilian industry. For this reason the Italian Parliament in 1906 established a compulsory cartel.[3]

The cartel thus established by law embraces all the sulphur producers of Sicily, and is called "Obligatory Association for the Sicilian Sulphur Industry." It was formed for 12 years dating from August 1, 1906. The purpose of the association is to conduct the sale of the raw sulphur for the common profit of the members. Sulphur for export to Italian or European markets must be sold at the same prices to all who desire it. The price of the sulphur sold in Italy for agriculture must not exceed the average price of sulphur for three years preceding less 5 per cent. The association has the sole right to sell sulphur, and its export from Sicily by others without its assent is forbidden. The cartel may establish by-laws restricting the production of sulphur when market conditions make it necessary, but such restriction must first have the approval of the Government.

From the proceeds of sale of sulphur is deducted (*a*) the cost of administration (not to exceed 1 lira per ton); (*b*) the amount necessary to cover the expenses incurred in connection with the miners' credit bank, and the rebate on the price of sulphur sold for consumption in Italy, as well as any expenses for the support of laborers deprived of employment through a restriction of production; and (*c*) a tax of 0.50 lira per ton to be used for old age and invalid pensions for sulphur miners. The association has the particular duty to establish and operate warehouses in Sicilian ports for the storage of sulphur, to accumulate funds for the establishment of a miners' credit bank to make loans to producers of raw sulphur, etc., at interest not exceeding 5 per cent, and to provide for old age and invalid insurance for sulphur miners.

The government of the cartel is lodged in a general assembly of 50 delegates, a board of directors, and a director general. The director

[1] Società Salviati Jesurum C. L. c. Ditta Pauly e C., Tribunale di Venezia, 14 aprile 1904; Rivista di Diritto Commerciale, 1904, II, p. 455.

[2] Legge 31 gennaio, 1901, sulla emigrazione, No. 23.

[3] Legge portante provveddimenti e l'istituzione di un consorzio obbligatorio per l'industria solfifera siciliana, 15 luglio, 1906, N. 333. A translation of this law is given in Exhibit E of this report (see p. 781).

general is named by the Italian Government. The general assembly is partly named by certain Government officials, partly by certain chambers of commerce, and partly elected by the sulphur producers. The voting power of the cartel members is based on the quantity of sulphur produced. Disputes between members and the association are settled by an arbitration court, the personnel of this court being prescribed in general terms in the law. The Italian Government provided a loan of two million lire at a low interest rate for starting the miners' credit bank.

By a subsequent law [1] certain minor modifications were made in the substantive provisions, including the right to sell sulphur below the normal price in certain instances, and restricting the right to open new mines to parties furnishing evidence of financial ability to conduct operations in a rational and efficient manner, while various changes were also made with respect to the organization and government of the combination.

Citrus Products Law.—A law was passed on July 5, 1908,[2] which established a commission for the promotion of the citrus products industry. Among other things the commission is authorized (1) to furnish certificates of analysis of certain citrus products shipped, shipment without such certificate being prohibited; (2) to advance money at interest to producers of citrus products up to two-thirds of their value; (3) to sell for the producers citrus products confided to it, a minimum selling price being fixed for each year; (4) to levy a tax on the said citrus products analyzed by it, in order to provide for expenses of administration, etc., a different kind of tax being levied on products intrusted to it for sale than on those sold by others.

Section 14. Spain.

There are various provisions of the Penal Code of Spain which punish with imprisonment and fine those who disturb the natural course of prices of commodities, securities, or other things which are matters of contract, as determined by free competition, by spreading false reports or "any other artifice." In case the commodity is of prime necessity, the maximum penalties shall be inflicted.[3] Lesser penalties are provided in article 593 of the same code for those who commit acts of a similar character for the same purpose, where the act does not involve a delict, but the distinction between the two is not clear.

To attempt to keep competitors away from public auctions by threats, gifts, promises, or other artifices in order to influence the

[1] Legge No. 361, 30 guigno, 1910, concernente i provvedimenti per l'industria solfifera siciliana. Gazz. Uff. 1 luglio, 1910.

[2] Legge No. 404, 5 luglio 1908, concernente i provvedimenti per favorire il commercio degli agrumi e loro derivati (Gazz. Uff. 17 luglio 1908).

[3] Código Penal, arts. 557, 558.

prices at such auctions is made an offense by article 555 of the Penal Code.

The Civil Code[1] makes contracts which are repugnant to good morals null and void (arts. 1116, 1271, and 1275). Article 1275 combines in substance the provisions of articles 1131 and 1133 of the French Civil Code (see p. 272), while the provisions of articles 1116 and 1261 of the Spanish law are similar to those of articles 1172 and 1108, respectively, of the French law. Article 1902 of the Civil Code, which is substantially similar to article 1382 of the French Civil Code, is applicable to unfair competition, but no instance of its application to combinations has been noted.

Section 15. Portugal.

The Penal Code of Portugal,[2] in a section of the code entitled "Monopolies," in article 275, makes it an offense for merchants to conceal supplies of daily necessities or to refuse to sell them to any purchaser. In article 276 penalties are provided for those who by fraudulent means succeed in altering the prices of commodities or public securities which would result from free competition; in case of a combination of individuals the offense occurs with the commencement of its execution. Article 278 makes it an offense to keep anyone away from an auction authorized by law or by the Government by means of gifts or promises or to embarrass or disturb free action by violence or threats.

There are certain provisions of the Civil Code which relate to the validity of agreements.[3] Article 10 declares that acts committed contrary to the prohibitions or commands of the law are void unless it is otherwise provided, but the parties interested may make them valid by mutual consent if the law which is infringed thereby does not affect public policy. Article 671 provides in part that acts contrary to public morals or to obligations imposed by the law can not be made the objects of a legal contract.

Article 2361 of the Civil Code, like article 1382 of the French Civil Code (see p. 273), is applicable to unfair competition.

Section 16. Switzerland.

There is, as yet, no general criminal law in Switzerland, this matter being largely within the jurisdiction of the several confederated Cantons.

The civil law of Switzerland contains several provisions, the interpretation of which is important with relation to industrial combinations.

CIVIL LAW.—Pertinent provisions of the civil law are found both in the Civil Code and in the Law of Obligations. Article 27 of the

[1] Código Civil. [2] Código Penal, 16. de Setembro 1886. [3] Código Civil, 1867, arts. 10, 671.

Civil Code[1] declares that no one may restrict the use of his liberty to an extent which is repugnant to law or good morals. Article 20 of the Law of Obligations provides:

ART. 20. An agreement which has an impossible or unlawful content, or which is repugnant to good morals is void.[2]

Certain other articles of the Law of Obligations affect the validity of acts or agreements which are contrary to good morals, namely, articles 19, 66, 163, 230, and 326. In particular it may be noted that according to article 66 whatever has been given in order to obtain an illegal or immoral result can not be demanded back, that according to article 163 a conventional penalty can not be demanded if it is intended to enforce an immoral promise, and that according to article 230, if an auction is interfered with in an unlawful or immoral manner, anyone who has an interest therein can attack it within a period of 10 days.

In a case decided in 1911,[3] a milk dealing company had broken an agreement with a milk producers' cartel which had restricted competition, and it set up in defense that the agreement was contra bonos mores and invalid under section 17 of the Law of Obligations of 1881, which provided: "Only a performance which is possible and not unlawful or immoral can be the subject of an agreement." The court said in part (p. 211):

It is, however, not apparent how the agreed apportionment of the milk sales between the producer and dealers * * * is immoral. For evidently neither the interests of the milk consumers are endangered in a manner that can be called an insupportable monopolization of a general indispensable article of food on account of artificial price regulation, nor is the claim of the defendant true that the maintenance of the prohibition would make the dealing in milk impossible for it.

An interesting case, of which a detailed statement has been made in the press, concerned the breach of a grain millers' cartel. A member, contrary to the cartel agreement, sold his flour directly. The Federal court in deciding the matter considered the application of section 20 of the Law of Obligations, referred to above, and declared that this did not constitute a defense merely because the conventional penalty imposed was very large. Judgment was given for the plaintiff, and the conventional penalty which was applicable was also determined by the court.[4]

Protection against unfair competition is found in sections 41 and 48 of the Law of Obligations, but no application of these rules has been noted with respect to combinations.

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[1] Schweizerisches Zivilgesetzbuch vom 10. December 1907.

[2] Bundesgesetz betreffend das Obligationenrecht v. 30. März 1911.

[3] Entsch. d. Schweizerischen Bundesgerichts, 1911, Teil II., S. 205. Urt. v. 24. Juni 1911 in Sachen Verband nordwestschweizerische Milchgenossenschaften gegen Birseckscbe Produktions- und Konsumgenossenschaft.

[4] Arrêt du 31 mai 1913; Kartell-Rundschau, Nov. 1913, pp. 903-905.

Section 17. Belgium.

Formerly both the Civil and Penal Codes in Belgium were the same as in France. The provisions of the Civil Code are still the same (see p. 281), but the provisions of the Penal Code were, in 1866, modified in part, particularly by the abrogation of the prohibitions contained in articles 419 and 420 of the French law. Monopolizing (l'accaparement) is, therefore, no longer punishable.[1]

CRIMINAL LAW.—The principal provisions of the present Penal Code of Belgium which are pertinent are articles 310, 311, and 314. Article 314, which forbids combinations to prevent competition at auctions, is substantially the same as the first paragraph of article 412 of the French Penal Code (see p. 272), except that the word "acts" is not included in the means employed, which embrace only force and threats, and need not be quoted here. Article 311 is a modification of article 419 of the French code, and reads as follows:

> Persons who by whatever fraudulent means shall have caused an increase or decrease of the prices of produce or merchandise or of public securities shall be punished with imprisonment of one month to two years and with a fine of three hundred to ten thousand francs.[2]

This Belgian law, unlike the French law (art. 419), applies only in case fraudulent methods are used.

Of more special interest is the first paragraph of article 310 of the Penal Code, namely:

> Every person, who with the purpose of compelling the increase or decrease of wages, or of interfering with the free operation of industry or of labor, shall have committed violence, proffered insults or threats, adjudged fines, prohibitions, interdictions or any proscription whatever, either against those who labor or against those who employ labor, shall be punished with imprisonment from one year to two years and with a fine of fifty to one thousand francs, or with one of these penalties only.[3]

An additional paragraph of this article relates to actions of assemblages of labor, etc.

An interesting case involving an interpretation of this law was briefly as follows: A combination of glass-makers made an agreement in 1904, which organized a lockout and the shutting down of the works. A member thereof was alleged to have infringed the agreement, and the question of authority being disputed, it was agreed to submit the matter to arbitration. The defendant company declared that it had the right not to establish a lockout without being fined, and especially that such fines could not be adjudged

[1] Pandectes Belges, Bruxelles, 1878, T. I., p. 995. Prior to 1866 a combination of forty brewers in Ghent was indicted for increasing the price of beer; they were found guilty and the judgment of condemnation was confirmed in the highest court of appeal. De Leener, Organisation Syndicale des chefs d'industrie. Bruxelles, 1909, Vol. II, p. 217.

[2] Code Pénal, art. 311.

[3] Code pénal, art. 310, as amended by the law of May 30, 1892. Nearly similar provisions are found in article 416 of the French Penal Code.

without violation of article 310. The last claim, however, was subsequently withdrawn. The arbitration court decided against the defendant member. Of its own motion the local magistracy intervened ex officio to annul the arbitration on the ground that under article 1004 of the Code of Civil Procedure an arbitration court could not disregard the criminal law.[1]

The court finally annulled the arbitration decision in 1909, after having determined as a necessary preliminary thereto that the law as expressed in article 310 did prohibit the imposition of a fine.[2]

Speaking of the resolutions of this combination with relation to article 310, the court said in part (p. 86):

> That the resolutions were highly restrictive of the liberty of the participants to the agreement, and of their workmen; * * * .

CIVIL LAW.—As already intimated, the Belgian Civil Code in articles 6, 1108, 1131, 1133, and 1172 preserves in identical language the articles of the French Civil Code, bearing the same numbers which have been quoted above (see p. 272), and need not be repeated here.

The courts, apparently, have generally upheld the validity of cartel agreements.[3] A combination of glass manufacturers in 1872 agreed that the works should be shut down for a certain period and that those conforming thereto should participate in certain contributions agreed to by all of the members. One of the concerns refused to pay its contribution and was sued therefor. The court held that the contribution was a lawful obligation,[4] and said in part (p. 177):

> That the agreement between the parties was not an attack on the free exercise of industry and labor; that it had for its cause an excess of production which would involve an abnormal decline of prices; that the shutdown, freely agreed to, of a limited number of furnaces during a fixed period in order to reestablish a fair proportion between production and the needs of consumption is not at all contrary to the public interest.

The legality of combinations of employers and laborers to fix the price or conditions of labor is shown in a recent judicial decision.[5] The essential facts of the case, as well as the chief legal distinctions made by the court, are sufficiently indicated in the following excerpt from the opinion (p. 266):

> Although employers and laborers have the right to combine in order to fix the price, the conditions of labor, etc., the use of this right is limited and the abuse of it is repressed by the laws which protect the liberty of the laborer and his work; that it is permitted to trades-unionists to make by-laws which govern the members of the

[1] De Leener, op. cit., Vol. II, pp. 225–226.

[2] Procureur général etc. c. Société anonyme des verreries de L'ancre etc., Cour d'appel de Liége, 24 février, 1909. Pasicrisie Belge, 1909, II, p. 84.

[3] Cf. De Leener, op. cit., Vol. II, p. 222.

[4] Hansotte et Cie. c. Mondron et consorts, Bruxelles, 29 mars 1877; Pasicrisie Belge, 1877, Pt. II, p. 175.

[5] De Béozières c. De Paepe, Cour d'Appel de Gand, 9 janvier 1907; Pasicrisie Belge, 1907, Pt. II, p. 264.

union and which authorize the expulsion of a member who disobeys them; but that in advising third parties of this exclusion with the threat that they will be exposed to disagreeable consequences in case they take the excluded person into their service, the secretary of the union attacked the freedom of the latter; that he ought to compensate the damage caused by that illicit act.

It is otherwise, however, with respect to combinations for bidding at public auctions. In an action for damages for breach of an oral agreement to avoid competition in making bids to furnish materials to the State railways, the court held that while article 314 of the Penal Code would not apply in this case, the agreement as shown by the record was invalid under articles 6, 1108, 1131, and 1133 of the Civil Code as contrary to public order, and based on an unlawful ground.[1]

In á more recent case, which did not affect bidding on public contracts, a different conclusion was reached. Certain producers of stone formed a syndicate through which they agreed to sell their product, and penalties were provided for violations of the agreement. A member of the syndicate who sold stone contrary to the agreement and was sued for the conventional penalties set up the defense that the agreement was invalid. The court of appeal of Brussels found that the prices of the syndicate were not abnormally high; that the syndicate had obtained only 54 per cent of the contracts for which it had competed; that it did not bid on public works; that the agreement was made for five years only; and that it covered only a part of the output of the members of the syndicate. The Court of Appeal, reversing the judgment of the lower court, held that the agreement was valid and said in part:

> That no provision of law nor principle of public order forbids merchants to associate and to grant an exclusive agency of sale to an organization created by them; that it can not be disputed that the right to trade may be restricted in a certain measure, that such an agreement does not violate this principle in so far as it does not stipulate a general and absolute prohibition, namely, unlimited as to time, place, and object.[2]

The Belgian Civil Code also contains in article 1382 precisely the same provision applicable to unfair competition which is found in the same article of the French Civil Code. (See p. 273.)

The agent of an association of dealers in druggists' goods, which aimed to enforce fixed resale prices, notified members of the association that a certain dealer was interdicted because of nonobservance of the regulations of the association. The association announced in its publications its intention to proceed vigorously against the delinquent dealer and to "quarantine" him. The said dealer was not a member of the association and had no general agreement with them,

[1] Nyssens et de Buyser c. Bodart, Cour d'Appel de Bruxelles, 5 mai 1904; Pasicrisie Belge, 1904, Pt. II, p. 240.

[2] Société coopérative pour la vente du petit granit c. la société anonyme d'Ogné-Sprimont, Cour d'Appel de Bruxelles, 24 juillet 1913; Pasicrisie Belge, 1913, II, pp. 314, 318.

though with respect to certain articles he had made agreements with the manufacturers not to sell below the established price, and claimed that he had kept his agreements. The dealer brought an action for damages against the agent of the association for procuring the refusal by manufacturers to supply him. The court declared that the free exercise of trade and industry was a principle of public order according to the decree of March 17, 1791, article 7, and that an infringement of that principle was unlawful even though the acts committed were not those prohibited in articles 310 and 311 of the Penal Code. The court held that the defendant was not permitted to resort to practices to induce all or a certain number of manufacturers to refuse to sell to the plaintiff or to sell only at a price which made it impossible to resell at a profit. The court held further that there was ground for an action for damages, but referred the case to an expert accountant for conciliation and eventually the determination of how much damage, if any, had been sustained by the plaintiff. The defendant was also required to pay the cost of publication of the judgment for the benefit of the plaintiff.[1]

Section 18. The Netherlands.

The Penal Code of the Netherlands, in article 334, prohibits, under penalty of imprisonment, all those who seek by spreading false reports to obtain an unlawful advantage over another in the increase or decrease of the price of commodities or securities.[2]

The Civil Code in articles 1371 and 1373 declares that an agreement without ground or based on a false or unlawful ground is invalid, and that under unlawful grounds are comprehended whatever is forbidden by law or is contrary to good morals or public order.[3]

These provisions of the Civil Code are not construed, apparently, to render invalid a combination agreement.

The validity of a cartel contract was involved in the following case: A combination of glass manufacturers known as the "Kartel van Glasfabrikanten in Nederland" was formed in 1905. The articles of agreement provided that the members should not alienate their factories except under certain conditions and that the nonobservance of this provision should be punishable by fine. A company called the Naamlooze Vennootschap Zuid-Hollandsche Glasblazerij, which was a party to this agreement, sold out and went into liquidation in a manner contrary to the provisions of the agreement, and was sued for the penalty. An arbitration court (which has a legal status) held that this company should pay the fine.[4]

[1] Gripekoven c. S . . . Tribunal de Commerce de Bruxelles, 12 novembre 1907; La Belgique Judiciaire, 1907, p. 1405.

[2] Wetboek van Strafrecht, art. 334.

[3] Burgerlijk Wetboek, arts. 1371, 1373.

[4] Arbitrale Uitspraken; Beslissing van 11 Nov. 1909; van Deventer tegen Maseland en N. V. Zuid-Hollandsche Glasblazerij. Weekblad van het Recht, 1910, No. 8968, p. 2.

Another case, for which, however, no official report has been obtained, is stated to be substantially as follows: An association of fruit wholesalers in the Netherlands had an agreement concerning prices and blacklists, with penalties for infractions thereof. A member of the association, contrary to the agreement, purchased from blacklisted firms, and was sued by the association for the payment of penalties. The court held that the association was established to uphold the interests of its members, and that the defendant had injured such interests and gave judgment for the penalty according to the agreement.[1]

The Civil Code also contains in article 1401 a provision applicable to unfair competition substantially similar to article 1382 of the French and Belgian codes.[2] No application of this provision to cartel practices has been noted.

Section 19. Sweden.

The general laws of Sweden contain, apparently, no provisions which are applicable to combinations to control the market.[3]

REGULATION OF IRON-ORE EXPORTS.—The Swedish Government made an agreement with an iron-ore mining company in 1907, which is of significance in this connection. According to this agreement it has become a shareholder in the company and regulates the exportation of iron ore. The general basis and purposes of this agreement are set forth in the following statement of the Swedish Prime Minister in 1910:

Formerly our laws permitted the discoverer of an ore deposit on crown-land to become sole owner of the same. This system, which was intended to promote the discovery of new ores, was changed so as to preserve for the state the right of ownership and the control of those ore deposits, first to the effect that the discoverer receives one-half and the state the other, such as is the case with deposits on private ground.

Later on, all claims upon crown-land in the Northern provinces, where the state owns extensive areas, were prohibited in anticipation of legislation, and finally it was decided this year to lay out certain areas around the great ore fields as government mining fields within which no claims shall be located.

Very likely you all know that our largest iron ore resources are in Gellivare and Kiirunavaara. When the government decided in 1898 to build a railway for the exploitation of the last mentioned mining field, the idea had already been conceived that a limitation of the export was desirable, and this limit was put down at 1,200,000 tons a year. In the same degree in which it became more and more obvious that these ore resources were enormous and could easily be disposed of, the demand for an increased export grew; but at the same time also the state asserted its right to regulate the exportation in such a manner that it should not go on too rapidly. This situation led to negociations between the government and the owners of the ore fields, with the results that an agreement was entered into in 1907. According to this agree-

[1] Bond van Nederlandsch Grossiers in Fruit tegen A. Bosnak. Amsterdam Rechtbank, 7 Juni 1910.

[2] Burgerlijk Wetboek, art. 1401.

[3] Raoul de la Grasserie: Les Codes Suedois de 1734 (civil, pénal, commercial) suivis des lois postérieures promulgées jusqu' à ce jour., Paris, 1895.

ment the state became the owner of half the shares in the company that now owns the mines of Gellivare and Kiirunavaara, and also became sole owner of certain other mining fields (Mertainen, Ekstromsberg and others), and in return for this undertook to carry 75 million tons of ore from Kiirunavaara and 19 million tons from Gellivare at a certain freight during a period of 25 years, besides which certain other regulations for the benefit of the company were made. These quantities have by a later agreement, in connection with the acquisition of the Svappavaara ore field by the state, been somewhat increased. It was considered also to involve certain benefits for the state to become a share-holder in a limited company, but on entering into the contract it was also decided that the state at the end of 25 years shall be entitled on certain conditions to take over the entire number of shares. The agreement may with every reason be said to have been advantageous for both parties, and forms a good example of cooperation between the state and the individual.[1]

The chief provisions of the agreement of 1907, stated in more detail, were as follows: (1) The State assumes the possession and use of all the iron ore deposits of Lapland, except in the Kiirunavaara and Gellivare districts, and receives from the present holders without compensation the ore deposits in certain other localities on the condition that no ore produced therefrom shall be exported. (2) The Luosavaara-Kiirunavaara Co. receives, in addition to its present possessions, the right to exploit all State iron-ore lands in the Kiirunavaara and Gellivare districts. (3) The capital stock of the said company is fixed at 80,000,000 kroner, one-half of which shall consist of preference shares to be given to the State; the State is also given the option to purchase the other half at the end of 25 years (1932), or eventually 10 years later (1942); if the State exercises its option of purchase the value is determined by an arbitration board on the basis of the average profit of the years 1920 to 1929, capitalized at 4 per cent. Limitations are placed on the alienation of the common stock by the present holders. (4) The State receives no dividends on its preferred stock before 1937, but instead certain royalties on every ton of ore produced, these royalties being higher for the later than for the earlier years. (5) The total quantity of ore to be produced and exported by the said company in the 25-year period ending 1932 is fixed at 93,750,000 tons, with certain additional quantities for following years if the State does not then exercise its option of purchase; the exports permitted in the earlier years are limited, and a gradual increase to a fixed maximum is provided for; Bessemer ore can not be exported except so far as necessary to fulfill existing contracts. (6) The freight rates for the carriage of this iron ore on the State railways to places of exportation are likewise fixed in the agreement. (7) The State also agrees that, in case an export tax is levied on ore, a drawback to the full amount shall be paid to the said company on the ore it exports.[2]

[1] A. Lindman. State Control of Iron Ore Mining in Sweden. Compte Rendu, XI Congrès Géologique International, Stockholm, 1910. p. 289.

[2] Stahl u. Eisen, Nov. 27, 1907, pp. 1736–1738.

Section 20. Norway.

The Penal Code of Norway[1] in section 273 makes it an offense to spread false reports for the purpose of influencing the prices of merchandise, securities, or similar articles. Section 401 provides that whoever, for the purpose of obtaining an unrightful gain for himself or another, dissuades or seeks to hinder another from bidding at a public purchase or sale by means of deception or gifts is punishable with fine or imprisonment.

The civil law of Norway is apparently not codified. It may be noted in this connection, however, that a French commentator states with respect to all the Scandinavian countries, that the civil law admits freedom of contract, provided that agreements are not contrary to public order, to good morals, or to compulsory provisions of law.[2]

A "Law for the Acquisition of Waterfalls, Mines, and other Real Estate" was passed on September 18, 1909, which contains restrictions intended to prevent monopoly.[3] With respect to water power concessions section 2 provides, in part, as follows:

> If it is a company which seeks the concession conditions may be made to prevent that a majority of the parts or shares of the company shall come to belong to anyone who owns or uses other waterfalls in this kingdom or who owns a majority of shares in any other company which owns or uses waterfalls in this kingdom.

Further, section 2 provides, in part, as follows:

> If the water power is used for the production of electrical energy the concessionaire must not, without the sanction of the proper government department, enter into any agreement for an artificial increase of prices of power in this kingdom.

Section 21. Denmark.

In the Penal Code of Denmark no provisions have been noted affecting the lawfulness of combinations.[4]

The civil law of Denmark is apparently not codified. The principles of the civil law, however, are apparently the same as in Norway with respect to the validity of contracts.

The only case noted with respect to combinations in Denmark is the following: A combination of Danish cement factories which had advanced the prices of cement in Denmark made an agreement with a cooperative society whereby the latter was to purchase its cement exclusively from the combination and was allowed a discount in price. The cooperative society sought to obtain supplies in another manner and was sued for breach of agreement. Judgment was given

[1] Allgemeines Bürgerliches Strafgesetzbuch, vom 22. Mai 1902; German translation by Rosenfeld and Urbye, Berlin, 1904.

[2] Lehr, Droit Civil Scandinave, Paris, 1901, p. 156.

[3] Lov om erhvervelse av vandfald, bergverk og anden fast eiendom.

[4] Allgemeines Bürgerliches Strafgesetzbuch vom 10. Februar 1866; German translation by Bittl. Berlin, 1901.

for the plaintiff by the Court of Commerce of Copenhagen with damages. The decision was upheld by the Supreme Court (1914).[1]

Section 22. Russia.

The chief provisions of the law affecting industrial combinations in Russia are found in section 242 of the new Criminal Code, which received imperial sanction on March 22, 1903, namely:

SEC. 242. A merchant or manufacturer who increases the prices of victuals or other articles of prime necessity in an extraordinary degree in accord with other merchants or manufacturers dealing in the same articles shall be punished with imprisonment.

If the culprit took advantage of the extreme need of the local population caused by the scarcity of these articles, he shall be punished with imprisonment of not less than three months.

A merchant or a manufacturer who increases the prices of victuals or other articles of prime necessity in an extraordinary degree to take advantage of the extreme need of the local population caused by the scarcity of such articles, is subject to the punishment fixed in paragraph one of this section.

The first and second paragraphs of this law are directed against combinations which do the thing prohibited, while the third is directed against individuals who commit the same act. The "extreme need" referred to in the above section of the Criminal Code, as shown by the official explanation of the motives of the legislator, means the already existing need, especially where caused by some calamity.[2]

Although the Criminal Code of 1903 covers a field of law similar to though not in all respects identical with that of the Penal Code of 1885, it does not appear that the former has been repealed, inasmuch as amendments have been frequently made therein subsequent to 1903. Hence the chief sections of the Penal Code of 1885 relating to combinations are likewise given here.[3]

SEC. 913. For a conspiracy, an understanding or other agreement among dealers for the purpose of increasing prices of articles of consumption the culprits shall be subject to punishments and fines provided by Section 1180 of the present Code.

SEC. 1180. In case of a conspiracy among merchants or manufacturers for the purpose of increasing not only the prices of victuals but also of other articles necessary for consumption or for an undue decreasing of the price with a view to impeding those who transport or supply these articles and thereby preventing also their further and larger supply the ringleaders of such unlawful agreements shall be subject to imprisonment for a term of from four to eight months; and the rest of them who only participated therein shall be punished, in accordance with the degree of their participation either by imprisonment of from three weeks to three months; or by a fine not exceeding two hundred roubles.

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[1] Faellesforeningen for Danmarks Brugsforeningen mod A/S Aalborg Portland Cement Fabrik; Hojesteretstidende, 58 Aarg (1914), p. 819.

[2] Tagantsev; Ugolovnoe Ulozhenie, 22 marta, 1903 goda (Criminal Code, Mar. 22, 1903). S. Petersburg, 1904, p. 395.

[3] Tagantsev; Ulozhenie o nakazaniiakh ugolovnykh i ispravitelnykh 1885 goda (the Penal Code on Criminal and Corrective Punishments of 1885), 16th edition, revised and enlarged. S. Petersburg, 1912, pp. 502, 746.

If, however, such a conspiracy caused an actual scarcity of articles of prime necessity and this led to a disturbance of social peace, then the ringleaders shall be punished by the deprivation of certain special rights and privileges, in accordance with Section 50 of this Code, and by imprisonment for a term of from one year and four months to two years; and the rest of the culprits by imprisonment for a term of from four to eight months.

In section 121 of the Code for Safeguarding the National Food Supply [1] merchants or manufacturers are enjoined from committing acts similar to those prohibited in section 1180 of the Penal Code of 1885, and in section 127 of the same code the municipal authorities are authorized in certain cases to prevent arbitrary increases in the prices of prime necessities by prescribing definite prices for the same.

The Civil Code, in section 1528, provides that a contract shall not be repugnant to the laws, to good morals, or to public order.[2]

In March, 1903, the Petrikov (in Poland) Circuit Court refused to entertain a petition of 14 Polish glue manufacturers against one of their members who had violated the syndicate agreement. The court held that "no person was bound to respect an agreement which is repugnant to law, to good morals, or to social order." [3]

A sugar refiners' syndicate was formed consisting of about 200 members for the apportionment of the output in the domestic market and for the compulsory export of surplus production under regulations of the syndicate and fines were provided for breaches of the agreement. A member of the syndicate violated certain provisions of the agreement relating to export and a fine was levied in accordance with the terms of the agreement. Action was brought by the seven managers of the syndicate in the Circuit Court of Kiev to collect the fine. The court held that the bill was defective with respect to the parties bringing the suit and that the agreement was defective in respect to the methods of enforcing the agreement, but the court did not pass upon the validity of the agreement itself. Appeal was taken on April 10, 1895, from this decision to the Court of Appeals of Kiev but was denied.[4]

However, on November 20, 1895, the first law regulating the output and exportation of sugar, which is described below, was enacted and this practically established a compulsory Government control of the sugar industry in substantially the manner aimed at by the syndicate.

According to a recent statement in the public press [5] certain members of a coal cartel ("Produgol") who desired to withdraw there-

[1] Svod Zakonov (v. XIII); Ustav o obezpechenii narodnavo prodovolstvila; Dobrovolskii, Ed., St. Petersburg, 1913, Part 3, p. 670.

[2] Svod Zakonov (v. 10, Pt. 1, Ed. 1900.).

[3] Raffalovich; Promyshlennye sindikaty, St. Petersburg, 1904, p. 49.

[4] Otchet po delu sindikata sakharozavodchikov s O. N. Baskakovoi (Report on the case of the sugar refiners' syndicate versus Mrs. O. N. Baskakova), Kiev, 1895, pp. 5, 80-90, 91-110.

[5] Kartell-Rundschau, April, 1914, p. 276.

from brought an action to have the agreement annulled. The Commerce Court of St. Petersburg declared the cartel agreement invalid. The case was appealed, but later the parties settled it out of court. It was stated, further, that criminal prosecution was contemplated by the Ministry of Justice.

To what extent the courts have made practical application of these laws is not known but, in any case, the Russian Government has in several instances given encouragement to the formation of cartels. It appears, moreover, that in Russia the decisions of the courts are not legal precedents, but follow administrative policy.

REGULATION OF SUGAR INDUSTRY.—On account of the disorganized condition of the sugar-refining industry, due to excessive production and the export of sugar at extremely low prices, which in turn threatened an important source of public revenue, the Russian Government, by a law of November 20, 1895, instituted an elaborate system of Government regulation.[1] This policy was adopted, apparently, for the purpose of so regulating the domestic production as to prevent a demoralization of the sugar industry, and to afford by indirect means a bounty on the exportation of sugar. According to the existing tariff laws of certain countries, Government bounties on sugar exported subjected such sugar to discriminatory treatment in the countries of importation.[2]

The Russian Government determined, first, how much sugar would be required for consumption in the domestic market, and then divided this quantity among the several factories in the following manner: Each factory was to have a minimum quantity of 60,000 poods, regardless of its output, and the rest of the quantity required for domestic consumption was divided among them in proportion to the previous output of each. The total quantity allotted for domestic consumption was subject to a so-called normal excise tax. The factories were also required to keep a reserve stock of sugar to be used for domestic consumption in case the Government should find it desirable to increase the quantity to be sold under the normal tax. Such sale might be ordered in case the domestic price exceeded a normal level of prices determined by the Government. The surplus sugar above the quantity fixed for domestic consumption and for the obligatory reserve had to be exported or carried over to the following year, because if sold in the domestic market it would be subject to a double excise tax, which was prohibitory. The export sugar was exempt from all taxation, while a practically prohibitory import tax was established so that very little foreign sugar was imported.

[1] Preyer: Die russische Zuckerindustrie, Leipzig, 1908, p. 49. A translation of this law is given in Exhibit F of this report. (See p. 789.)

[2] It may be noted that the system established by the Russian Government under the law of Nov. 20, 1895 was held by the Supreme Court of the United States to provide in effect a bounty within the meaning of the tariff laws of the United States. Downs v. United States, 187 U. S., 496 (1902).

The right to sell sugar in the domestic market under the normal tax could be transferred from one factory to another, and as certain factories were more advantageously situated for the export trade, they frequently sold this right with respect to certain quantities of sugar to other factories which were thus enabled to sell corresponding quantities in the domestic market in addition to their regular allotments. The value of such rights so transferred depended chiefly on the current difference in the domestic and export prices, and this amount was generally regarded as being substantially a bounty on the exportation of sugar.

As the domestic prices were high, it was an advantage to export sugar even at a loss, or to produce sugar and carry it over to the next year, because the total production of a factory in one year was the basis for determining how much it could produce and sell in the domestic market in the following year. In a practical sense, the chief defect of the law was that there was too much incentive given to increase production.

The law was modified May 12, 1903, to prevent a too rapid increase in production by fixing the total quantity apportioned to each factory, so that an actual increase in production would not entitle it to an increase in the quota for domestic consumption.[1]

In 1907 Russia became a party to the Brussels International Sugar Convention, under special conditions, i. e., preserving its customs and excise tax system, but limiting its export to a fixed quantity, except overland to oriental markets.[2]

Subsequent legislation indicates that import duties on sugar were lowered and export drawbacks suspended in order to keep domestic sugar prices below the prescribed limits.[3] Recently the Government apportioned the total quantity of sugar exported among the various refiners.[4]

Section 23. Roumania.

Legislation in Roumania is chiefly of interest in connection with special regulations made concerning the petroleum industry. The Penal Code,[5] in article 351, contains a prohibition against interference with free competition in public auctions, which is similar to article 412 of the French law. (See p. 272.) The most important provisions of the civil law regarding the validity of contracts appear to be nearly the same as those of France and Italy; articles 5, 948, 966, 968, and 1008 of the Roumanian Civil Code[6] are nearly identical

[1] Preyer: Die russische Zuckerindustrie, Leipzig, 1908, p. 73.
[2] Journal des Fabricants de Sucre, 21 janvier, 1914.
[3] Decree of Apr. 15, 1910: Sobranie Uzakonenii, 1910, ch. 681.
[4] Ibid., 1912, pt. 1, ch. 2024.
[5] Codicele Penal.
[6] Codicele Civile.

in phraseology with articles 6, 1108, 1131, 1133, and 1172, respectively, of the French Civil Code (see p. 272), and need not be given in detail here. The Roumanian Civil Code in article 998 has a provision applicable to unfair competition, which is also practically identical with article 1382 of the French law. (See p. 273.)

APPORTIONMENT OF DOMESTIC SALE AND PRICE REGULATION OF PETROLEUM.—Several powerful oil companies, largely controlled by German banks, through combination, had at times fixed the prices of illuminating oil in the domestic market, while another company owned by Standard Oil interests apparently threatened to seize the whole domestic business by cutting prices. Whichever of these parties won, the immediate effect on the small Roumanian refiner, as well as the final result to the public, was viewed with apprehension by the Government, and in 1908 a law was passed for the legal apportionment of domestic sales of illuminating oil and the regulation of domestic prices.[1]

The original apportionment of the domestic sales was in general based on rated annual capacity of crude-oil consumption, but the refineries which had a capacity of less than 40,000 tons and more than 10,000 tons were given 200 per cent in addition, while those having a capacity of less than 10,000 tons were given 400 per cent in addition. The Finance Ministry each year determines the total domestic requirement of illuminating oil and informs each refinery of the quantity allotted to it for the year. Additional quantities of oil may be produced for export or for storage under strict Government control. Refineries not equipped to refine illuminating oil of required quality are forbidden to produce any.

The maximum domestic selling prices are fixed by the Government, on the basis of the average price of crude oil, and in addition 3.50 to 4.50 lei (francs) for refining cost and profit. The price may be changed every three months, and the refineries notified thereof by the council of ministers.

Heavy penalties of fine and imprisonment are provided for refiners who break the law, especially after the first offense, and for officials who are guilty of aiding them therein.

Provision is also made for the establishment by the Government of local reservoirs or tanks to lease to small refiners at a rental of 10 per cent of the investment cost to cover interest and amortization.

This law was amended in 1910 by making seven instead of three classes of refiners and giving to the small producers very much larger quotas in proportion to their capacity.[2]

[1] Law concerning the apportionment of the total requirements of illuminating petroleum among the refineries of the country; Law of Apr. 10, 1908 (o. s.). Summarized from German translation in Denkschrift über das Kartellwesen, Berlin, 1908, IV. Teil, pp. 151-154. A translation of this law is given in Exhibit G of this report. (See p. 794.)

[2] Daily Consular Reports, Aug. 17, 1910, p. 524.

Section 24. Turkey.

The Penal Code of Turkey[1] contains in article 238 a provision against interfering with free competition in auctions similar to article 412 of the French Penal Code. (See p. 272.) Article 239 of the Turkish Penal Code, which prohibits combinations to effect changes in the prices of commodities or securities is nearly identical in verbiage with articles 419 and 420 of the French Penal Code (See p. 269). The penalties are doubled for combinations affecting breadstuffs and potables, fuel and other objects of primary necessity.

Section 25. Greece.

PENAL CODE.—There are several provisions of the Penal Code[2] which are of interest in this connection.

Article 407, which is similar to article 419 of the French Penal Code, is as follows:

ART. 407. Whoever with the intention to discredit moneys not withdrawn from circulation, or to change their legally determined value, or with the intention to increase the price of wares, public securities, or other objects offered for sale above the ordinary price formed through free commerce, or to depress under the same, or to hinder the sale of such articles, or to compel a definite price, knowingly spreads false reports or facts, if this occurs in consequence of an agreement made among several, shall be punished with imprisonment up to six months and with a fine of fifty to one thousand drachmas, otherwise with imprisonment up to two months and a fine of from twenty to two hundred drachmas.

Article 436 prohibits interference with competition at auctions:

ART. 436. Whoever at public auctions hinders free competition through force or threats, or intentionally removes or keeps a bidder away through gifts or promises, shall be punished with imprisonment up to three months.

Besides these prohibitions regarding serious offenses there are three provisions, articles 585, 586, and 671, regarding "minor offenses" for which the penalties are generally less severe. The first of these contains prohibitions similar to those of the ancient English statutes against engrossing, regrating, and forestalling. (See p. 2.)

ART. 585. Whoever seeks to keep another from access to the markets; whoever overbids the prices asked by the sellers, whoever seeks to force other buyers or sellers from the market, dealers in victuals and middlemen, who buy up on the way victuals destined to the market or in order to remove them from free commerce and to draw them exclusively to themselves, make secret agreements with the sellers, must pay fines of from 10 to 200 drachmas.

ART. 586. Tradesmen entitled to sell victuals who without lawful causes of hindrance do not provide themselves with the prescribed supplies, conceal the same in case of demand from the authorities, refuse to deliver against payment to any buyer, or agree to dispose of certain victuals only at definite times, in certain order, or at prices above the rates fixed by the authorities, are punished by a fine of from 30 to 300 drachmas.

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[1] Das türkische Strafgesetzbuch, German translation by E. Nord, Berlin, 1912.

[2] Strafgesetzbuch des Königreiches Griechenland (1834). (Official translation.)

It is further provided in article 587 that if the offenses prohibited in articles 585 and 586 are committed in periods of public disorder penalties of arrest shall be imposed in addition to fines.

Only the first paragraph of article 671 is given below; the second paragraph relates to the disposition of defective goods.

ART. 671. Whoever through curtailment in measure or weight, or through deficient quality of salable articles, or through excessive demand in price or wages violates the rules of any existing rate regulation, incurs a fine of from 30 to 300 drachmas.

SPECIAL LAWS.—The production of currants and the manufacture of wine therefrom is one of the most important economic activities of Greece. The fruit is also used for other purposes, including the making of alcohol. Unsatisfactory conditions led to the establishment of a special bank in 1899 which centralized in a large measure the purchase and sale of currants. For the further amelioration of the currant trade a law was passed on June 21, 1904, forbidding the extension of currant plantations. On July 17, 1905, a law was passed establishing a company called the "Privileged Company for Promoting the Production and Commerce in Currants," which ratified an agreement between the executive branch of the Government and two banks concerning the regulation of the currant trade, and provided the legislation necessary to enforce the provisions of the agreement. This company was established with a capital stock of 20,000,000 francs and a 20-year concession terminable after 10 years by Government purchase. It is required to advance money to the producers on their crops in order to prevent currants being dumped at low prices and also to purchase at the end of the campaign all currants offered to it at minimum prices, fixed according to quality. Various other privileges and obligations were attached to the company's charter. It was also provided that alcohol for commercial use might be produced only from currants or grapes. By a law of March 27, 1910, the overproduction of currants was met by providing for a systematic destruction of inferior currant vines, compensation being made to the owners.[1]

Section 26. Brazil.

The laws of Brazil are of interest, particularly with respect to the provisions made in the customs laws and in the special laws regarding the valorization of coffee.[2]

[1] For general information on this subject see Basiliu: Griechenland, Jahrbuch für vergleichende Rechtswissenschaft und Volkswirtschaft, 1910, pp. 1597-1598, and Struck: Zur Landeskunde von Griechenland, 1912, pp. 103-104, and for details respecting the Privileged Company see Société Priviligiée pour Favoriser la Production et le Commerce du Raisin de Corinthe, Statuts, Conventions et Lois, Athènes, 1905.

[2] It also appears that the Brazilian Government a few years ago made arrangements which recently expired whereby exclusive privileges were conferred with respect to the mining and the exportation of mining monazite sand, a material used in the manufacture of gas mantles. Deutsches Handels-Archiv, 1908, I. Th. p. 277; Ib. II. Th. p. 495; J. P. Krusch, Die Versorgung Deutschlands mit metallischen Rohstoffen, Leipzig, 1913.

CUSTOMS LAW.—The customs law of Brazil provides that the President of the Republic is authorized—

To modify the rate of import duties, even to the extent of permitting free entry during a certain period, for articles of foreign origin whch can compete with similar national products, when these are produced or marketed by trusts.[1]

COFFEE VALORIZATION.—Owing to the overdevelopment of coffee plantations in certain States of the Republic, and to an extraordinary crop in the season 1901–2, the stocks of coffee were greatly increased, and the financial position of the coffee planters was thereby rendered precarious. Various methods were considered for preventing the increase of stocks, as, for example, the burning of a portion of the coffee crop, while some restriction of new plantations was accomplished through special taxation. The Government also tried to alleviate the situation by reducing the export tax on coffee, namely, from 13 per cent to 11 per cent ad valorem.[2]

In 1905 the movement for the so-called valorization of coffee was initiated, and on December 29, 1905, a law was enacted by the State of Sao Paulo laying a tax of 3 francs on each bag of coffee containing 60 kilos (132.3 pounds) exported in order to obtain a basis for financing this scheme.

In the following year (Feb. 26, 1906) three States—Sao Paulo, Minas Geraes, and Rio de Janeiro—made an agreement known as the "Convenio de Taubaté," of which the most significant features were substantially as follows:[3] That coffee should be maintained in the domestic markets at minimum prices of 55 to 65 francs per bag (7.9 cents to 9.34 cents per pound) for a standard grade (No. 7 American), such price to be subsequently raised to 70 francs if the market permitted; that the export of coffee inferior to No. 7 should be discouraged and such coffee kept for home consumption instead; that a surtax of 3 francs per bag be levied on all coffee exported from the contracting States, the proceeds to be used for valorization purposes; that the existing tax laws to hinder the planting of new areas be continued for two years and eventually longer; that the State of Sao Paulo be authorized to borrow £15,000,000 on the security afforded by the surtax, and the joint responsibility of the three States; that the advantages resulting from the agreement should be apportioned among the three States according to the amount of surtax collected, and that the agreement should take effect after ratification by the President of the Republic.[4]

[1] Actos do Poder Legislativo, Lei N. 2919—de 31 Dez., 1914, sec. 2, IX. A similar provision has been in effect since 1907.

[2] Dettmann, Das Moderne Brasilien, Berlin, 1912.

[3] Translations of this and other important agreements relating to this subject are given in Exhibit H of this report. (See p. 797.)

[4] Petition in equity, United States of America r. Herman Sielcken et al., Washington, Government Printing Office, 1912.

The loan provided for in the agreement was intended to be used for the purpose of buying and carrying large stocks of coffee. By a second convention of July 4, 1906, between these three States, the minimum prices were reduced and provision made for undertaking the work without the approval of the President. A Federal decree of August 6, 1906, however, approved these conventions after making some modifications. Subsequently they were further modified in some particulars, especially as to the minimum domestic prices.

To further promote the valorization plan the quantity which could be exported was limited. On August 25, 1908, Sao Paulo passed a law which practically limited the export of coffee from the State to 9,000,000 bags for the crop year beginning July 1, 1908, to 9,500,000 bags for the next crop year, and to 10,000,000 bags for succeeding years, by levying an additional ad valorem tax of 20 per cent on coffee exported in excess of the quantities specified. This law also increased the surtax on exported coffee to 5 francs per bag and authorized a loan of £15,000,000 for carrying out the measures necessary "for the defense of coffee" and for the consolidation of temporary financial obligations connected therewith. The Federal Government sanctioned this law by an act of December 9, 1908, guaranteed the loan of £15,000,000 arranged for, required that certain stocks of coffee owned by Sao Paulo be made an additional guarantee, and made certain other provisions intended to give the Government greater security.

To finance this valorization scheme several loans previously made were consolidated in a loan of £15,000,000 obtained according to a contract made with J. Henry Schroeder & Co., of London; Société Générale, of Paris; and the Banque de Paris et des Pays-Bas on December 11, 1908.

On the same day the bankers and representatives of Sao Paulo made an agreement for the organization of a committee of seven to exist 10 years, which was given extensive power with respect to the sale of the Brazilian coffee in the United States, Europe, etc., and the payment of the moneys due the bankers. In particular, Sao Paulo agreed to sell at auction through the committee 500,000 bags of its stocks in 1909–10, 600,000 bags in 1910–11, 700,000 bags in 1912–13, and the same quantity in each succeeding year; further, additional quantities not to exceed these obligatory quantities, for each year, respectively, might be sold to meet the demands of the trade, provided that the prices were not less than specified, namely, 47 francs for "good average" and 50 francs for "Havre type superior" per 50 kilos. It was also provided that additional quantities, if needed by the trade, might be sold at a price to be agreed to by the Government.

With the money borrowed from the bankers the State of Sao Paulo purchased great quantities of coffee and placed it in storage; the

total quantity so accumulated on December 31, 1907, appears to have been 8,146,123 bags. Several million bags were purchased later, while even larger quantities were sold during the same period, so that in 1912 it was estimated that not more than 5,000,000 bags remained in the hands of the committee. During the period 1906 to 1912 the prices of coffee in foreign markets were decidedly increased.

Section 27. Argentina.

The Penal Code,[1] in article 206, imposes penalties on those who solicit or offer gifts or promises in order not to take part in public auctions or those who feignedly present themselves as bidders.

The Civil Code [2] contains numerous provisions which are of interest in this connection. Articles 21 and 564 contain provisions substantially similar to articles 6 and 1172, respectively, of the French Civil Code, and article 536 practically combines the provisions of articles 1131 and 1133 of the same code. (See p. 272.) Article 987 declares:

ART. 987. The object of jural acts must be things which are in commerce or which for a special reason have not been prohibited to be the object of a jural act, or acts which are not impossible, invalid, contrary to good morals, or prohibited by the laws, or which do not oppose the liberty of action or of conscience, nor prejudice the rights of a third person. Jural acts which are not conformable to this provision are null as if they had no object.

Provision is made in article 1081 for several ways by which the nullity of a jural act may be judicially determined, which declares in part that it may be sought by the public minister in the interest of morality or of the law.

In article 1143 the law provides a possible remedy against unfair competition, the text of this article being substantially similar to article 1382 of the French Civil Code.

According to The Board of Trade Journal issued by the English Government,[3] a bill was introduced in the Legislature of Argentina on August 30, 1913, which provided, among other things, that every contract or combination of any kind regarding commerce or transport is forbidden when its object is to produce artificial alterations to the prejudice of the consumer in the prices of articles of consumption or of prime necessity, that the directors of a legally constituted company who take part in the transaction are to be held personally responsible, that on a second offense by the directors or representatives of such company it may be dissolved, and that a limited liability company or its agency which is guilty of repeated offenses may be fined from 10,000 to 500,000 pesos.

[1] Código Penal.
[2] Código Civil, 1906 ed.
[3] The Board of Trade Journal, Sept. 25, 1913, p. 742.

It is understood that this bill was introduced on account of an alleged combination among meat packers, but that it failed, largely on account of the opposition of the stock raisers.[1]

Section 28. Colombia.

A provision of the Commercial Code of Colombia has been noted which is so pertinent to this subject that it deserves mention. Article 6 of this code reads as follows:[2]

ART. 6.—The establishment of companies (Sociedades anónimas) contrary to good morals, to public order and to legal regulations is prohibited; as well as those which do not deal with a real object and one of lawful business, or which tend to a monopoly of the necessities of life or of any branch of industry.

Section 29. Mexico.

In Yucatan, Mexico, a public commission has been established to regulate the price of henequen or sisal fiber. This commission is entitled "Comision Reguladora del Mercado de Henequen," and was created in accordance with a State law enacted in August, 1911. This law authorizes the governor to appoint a commission, of which he is also a member ex officio, who shall engage in the purchase of sisal fiber with a view to a better regulation of the price. A Government loan of 5,000,000 pesos was also authorized to be placed at the disposal of the commission for this purpose, and in order to meet this loan a tax was provided to be levied on unmanufactured henequen at rates ranging from one-half centavo to 1 centavo per kilogram, according to the price of the fiber in Yucatan. The commission is directed to maintain through its mercantile operations an equilibrium between supply and demand and to aid in directing excess production to new outlets. The law also provides that any profits arising from the mercantile transactions of the commission shall be applied to promote and further the manufacture of fiber within the State of Yucatan. This commission began operations in 1912. The fiber growers have organized an association to cooperate with this commission and have agreed to use it as a central selling agency.

Section 30. Japan.

There is apparently no law specifically relating to trusts or combinations in Japan. Article 48 of the Commercial Code,[3] which is similar in some respects to section 138 of the German Civil Code, reads as follows:

ART. 48. If a business association acts contrary to the public order or good morals, the court may dissolve it on the application of the Attorney-General or by exercising its executive power.

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[1] Report of the Royal Commission on the Meat Export Trade of Australia, 1915, pp. 20, 21.
[2] Ley de 1888 (21 de Febrero) que reforma el Código de Comercio.
[3] The Commercial Code of Japan, by Yang Yin Hang. Boston, 1911.

A similar provision with regard to foreign business associations having branch offices in Japan is found in article 260, which follows:

ART. 260. If a representative of a foreign business association establishing a branch office in Japan commits any act contrary to the public order or good morals during the management of the business of the association, the court may upon the application of the attorney-general or by its own executive power order the branch office to be closed.

Article 262 of this code provides penalties for disobedience to orders of the court made in pursuance of article 260. The pertinent parts of this article read as follows:

ART. 262. Promoters, members managing the business of a business association, directors, representatives of foreign business associations, auditors, or liquidators are punished by a fine of from ten *yen* to one thousand *yen* in the following cases:

* * * * * * *

9. When they act contrary to an order of the court issued according to the provision of Art. 260.

It is not known whether any judicial application of these laws has been made with respect to combinations which restrict competition.

Where a trade name and business or a business alone is transferred articles 22 and 23 of this code provide for restricting future competition by the transferor with the transferee, if no express agreement has been made regarding it. As these articles, however, are of more particular interest with regard to the question of unfair competition the texts are given in Chapter X. (See p. 695.)

Section 31. China.

No satisfactory data have been found regarding the laws of China in respect to combinations in restraint of trade, but a comparatively recent work based on original sources makes the following statement concerning this subject.[1] In this quotation the Chinese characters for the titles of the laws referred to, etc., are indicated by asterisks and the references to authorities are omitted:

Arrangements to artificially influence the market are contrary to law. For a person to unduly depress or raise prices to suit his own convenience entails a penalty of eighty blows; and undue profit arising therefrom will be treated as theft.

TRADE COMBINATIONS.—Our railway directors and shipping agents would be in gaol in a very short time, if they ventured on their ordinary practices in China, under the clause ******—i. e., the law against 'ruffians establishing conferences and preventing shippers chartering outside vessels'; and the originator of the combination to raise sales would be sent to military servitude on the borders after a month's cangue,[2] while those who combined with them would get one hundred blows and three years' transportation. So in the case of Chang Hao ** and others, where some licensed shipping agents and others who combined to raise the rates on a demand for transport arising were so sentenced.

[1] Alabaster: Notes and Commentaries on Chinese Criminal Law, London, 1899, p. 545.

[2] A form of punishment similar to pillory.

CORNERS.—*Forbidden.* So in the case of a corner in bread stuffs denounced by special edict from the Throne; and the Governor-General of the province wherein the case arose was directed to enquire into these practices and punish the offenders ******.

Section 32. International law.

No treaties have been noted which affect directly the lawfulness of combination agreements.

The nearest approach to such international regulation, apparently, was the Brussels treaty of March 5, 1902, regarding sugar legislation, which has been referred to above. (See pp. 268,290.) This treaty was signed by Germany, Austria-Hungary, Belgium, Spain, France, Great Britain, Italy, The Netherlands, and Sweden. The following provisions are specially noteworthy. Article 1 of this treaty provided that the signatories should suppress direct or indirect bounties which would benefit the production or exportation of sugar and should not establish such bounties during the term of the treaty. Article 3 provided that the import duties on imported sugar should not exceed the internal taxes on sugar of domestic production by more than 6 francs per 100 kilograms for refined sugar or 5.50 francs for other kinds of sugar. Article 4 provided that the signatories should levy a special import tax on the imports of sugar from countries which allowed bounties on the production or exportation of sugar, the amount of the tax to be equal to the value of the bounty. Article 7 provided for the creation of a commission to decide certain questions, to collect information, and to supervise the execution of the treaty. This treaty was made for a term of five years, commencing September 1, 1903, with provisions for its continuance from year to year, for the admission of other States and for the withdrawal of signatory States on prescribed notice. Russia became a member in 1907 under special conditions (see p. 290), and there were other changes with respect to the States adhering to the treaty. On March 17, 1912, the treaty was prolonged for five years, the following States being signatories: Germany, Austria-Hungary, Belgium, France, Luxemburg, The Netherlands, Peru, Russia, Sweden, and Switzerland. Rules were established for withdrawal, and special provisions were again made regarding Russia. Great Britain was not a party to this agreement.

The relation of this treaty to the international regulation of cartels is found in the fact that certain governments had established export bounties on sugar, and that in some cases the apportionment of these bounties among producers was affected by the existence of cartels which regulated production and exportation and which depended largely on the existence of such bounties to maintain their organization. As already pointed out (see p. 268), Austria-Hungary passed a law in January, 1903, which fixed the quotas of production of sugar manufacturers; but this was held by the commission which was estab-

lished under this treaty to be repugnant to the provision forbidding the granting of indirect bounties, and so this law was repealed in July, 1903. On the other hand, when Russia became a signatory to the treaty it was under the special condition of preserving its customs and excise system with respect to sugar which would apparently have been inconsistent with the general provisions of the treaty.

The Russian Government, which did not take part in the original establishment of the treaty in 1902, held that its system of regulating the sugar industry was not equivalent to a grant of bounty, and the Minister of Finance in Russia at that time, Mr. de Witte, through the Russian Ministry of Foreign Affairs, intimated to the representatives of the signatory powers that the Russian Government was willing to negotiate concerning a treaty which should look to the prevention of conditions which tend to the elevation of domestic prices and the depression of prices in international trade with respect to all important commodities, whether on account of bounties, industrial combinations, or otherwise.[1]

[1] Raffalovich, Trusts, Cartels & Syndicats. Paris, 1903, pp. 196–198.

CHAPTER VI.

UNFAIR METHODS OF COMPETITION FROM THE BUSINESS AND ECONOMIC VIEWPOINT.

Section 1. Introductory.

About the subject of unfair competition centered a large share of the debate on trust legislation during the third session of the Sixty-third Congress (1914). It was discussed in connection with the act creating the Federal Trade Commission as well as the Clayton Antitrust Act. In the former "unfair methods of competition in commerce" are declared unlawful,[1] and the Federal Trade Commission is directed "to prevent persons, partnerships, or corporations, except banks and common carriers subject to the acts to regulate commerce, from using unfair methods of competition in commerce." This general prohibition of unfair competition is supplemented in the Clayton Antitrust Act[2] by prohibition of certain specific practices, including price discrimination and exclusive-dealing requirements. It is the purpose of this chapter to indicate how the term "unfair competition" and other similar terms have been applied by economic writers and by business men, and to describe some of the competitive acts which have been complained of as unfair.

NO DEFINITION OF UNFAIR METHODS OF COMPETITION ATTEMPTED IN THIS CHAPTER.—It is not intended in this chapter to define the meaning of "unfair methods of competition," nor is the term capable, probably, of exact definition in brief terms. Indeed, the unfairness may often depend as much on the circumstances as on the method itself. The purpose here is merely to indicate methods of competition which some persons have viewed as unfair without attempting to pass upon their fairness or unfairness. Citation here does not indicate, therefore, any conclusion that the action or practice cited should or should not be considered unfair, still less that it is among the "unfair methods of competition" which Congress has prohibited. Some of the methods included in this chapter might perhaps be regarded by Congress and by a majority of people as legitimate and proper. Nevertheless, the presentation of various and sometimes conflicting views may throw some light on the question of the unfairness of particular practices when they come up for actual decision.

[1] See p. 128.

[2] See p. 132.

This chapter, dealing with business and economic rather than legal opinions, excludes the decisions of courts on the legality of certain methods of competition—a subject treated in the following chapters of this report. However, complaints in antitrust suits are occasionally cited here on the same basis as other complaints, namely, to show that some persons have regarded the methods complained of as unfair.

The enumeration of devices here given is not exhaustive. Neither are the several designations of the kinds of unfair competition always mutually exclusive. They are intended to follow in general the views that have been expressed and the complaints that have been made, and this inevitably results in some crossing of classification.

KINDS OF COMPETITION.—The natural rivalry between one manufacturer and another, between one dealer and another, each striving for business and profits, constitutes the competition which has been called "the life of trade."

This competition may be classified according to the class of traders engaged in it, the point at which competition occurs, the size and circumstances of competitors, and the fairness or unfairness of the competitive methods.

COMPETITION BY CLASSES OF TRADERS.—Competition, as the term is here used, may be subdivided by classes of traders as follows:

1. Between producers of raw materials.
2. Between manufacturers.
3. Between dealers, wholesale or retail.
4. Between concerns combining several stages in the process of production and distribution.

There is, however, competition between competitors one or both of whom are engaged in more than one stage in the process of production and distribution. If a single concern combines the functions of raw-material producer, manufacturer of primary products, manufacturer of secondary products, wholesale distributor, and possibly also retail distributor, thus putting the product into the hands of the final consumer, its competition with a concern engaged only in manufacturing, or a concern engaged only in mining, is relatively much more limited in points of contact than that between two like concerns.

POINT AT WHICH COMPETITION OCCURS.—The point in the process of production and distribution at which competition occurs is different in different cases; it may take place at almost any stage of the process. There is a kind of competition in each concern's development of its own internal productive efficiency. Competition is most obvious, however, at the points where the competing units come into contact with outsiders, and it is conspicuous in proportion as this

contact takes the form of a struggle for something of which each competitor must have less as the others have more. The points of contact with outsiders are chiefly connected with the hiring of labor, the purchase of raw material or goods, and the sale of the product or commodity. Usually the competitor appears to be not so keenly aware that his supply of raw material or goods and of labor is limited by the purchases or the hirings of others. At the selling end, however, the demand almost always appears limited, and each competitor feels sharply that his sales will tend to be less as his neighbor's are greater. At this point, therefore, competition is usually most conspicuous. At any one of these stages the methods of competition may be fair or unfair.

INEQUALITIES IN SIZE AND OTHER CIRCUMSTANCES OF COMPETITORS.—Mere differences in size may also make competition one sided, even where no competitor works in more than a single stage of the process of production and distribution. A company of ample capital, large plants, extensive credit, experimental departments, and an elaborate selling organization may be able, in some cases, to buy more cheaply its raw materials, to manufacture its products more economically, and to undersell its competitors. Mere size, however, does not necessarily create serious inequality of competitive conditions. Some of the larger "trusts" are notoriously inefficient, and their independent competitors do a large and increasing business.

The possession of unusually good supplies of raw materials, the location of plants close to raw materials, or to markets, often give special advantages to some competitors. Unusually capable workmen or particularly able management, newer or better machinery, the ownership or control of patents or special processes, are also factors which may give a concern special advantages.

Such special advantages in competition have usually been regarded as fair, except perhaps where monopolization exists with respect to natural resources, or where advantage has been taken of large capital resources to extend credits abnormally.

Section 2. Fair and unfair methods of competition.

Some methods of competition are universally recognized as proper and legitimate, such as supplying goods of better quality for the same price or goods of the same quality at a lower price, and more prompt or more satisfactory service. Dishonest methods are condemned by most persons not immediately profiting by their employment, such as false weights and measures or passing off one commodity for another. There is a great intermediate field of practices which lie, in varying degrees, under the shadow of general disapproval, and the shadow is slowly shifting. For instance, in the early days of railroads it may have generally seemed right that the shipper of 10 carloads

should have a lower freight rate than the shipper of 1, as it now seems to most people that the shipper of a carload should have a lower rate than the shipper of a hundredweight. To most people the reduction for 10 cars seems just no longer. Such an advantage is now generally conceived as unfair where the shipments are in carload lots, and to attempt to get it is condemned as an unfair method of competition. A thing which may have once seemed fair is now deemed unfair, because it has been found to lead to the inevitable destruction of the less favored, and hence to monopoly and to the oppression of producers of raw materials, manufacturers, and consumers.

Competition does not necessarily involve any direct dealings with competitors. It consists largely in dealings with other persons. Since every act of competition affects persons who are not competitors, it follows that every such act, while it may be judged as either fair or unfair toward competitors, may also be judged as either fair or unfair toward others. For instance, selling cotton goods for woolen or imitating a competitor's trade-mark may be unfair both to the competitor and to the consumer. In its relation to the consumer it may be called fraudulent. In its relation to a competitor it may be called unfair competition.

That is, when any act is viewed as an act of competition it is usually viewed in its relation to competitors, and to call it unfair competition is to call it unfair to competitors. Yet the conception of fairness in competition which prevails at any given time is largely determined by the prevailing conception of what is good for persons other than the competitors. Indeed, it seems likely that, among us and at the present time, the fairness of a competitive method is judged chiefly by what is believed to be its ultimate effect on consumers of the products which the competitors sell or on producers of raw materials which the competitors buy.

The seller who reduces prices has long been viewed with approval by general public opinion and by the law. Agreements of sellers to keep up prices have long been, and still are, in those situations where trade is restrained, illegal. Sellers, wholesale or retail, used generally to make different prices, as a matter of course, to different customers. The price was reached by a process of bargaining, and depended largely on skill in bargaining. These methods seemed good largely because they seemed advantageous to the consumers. Yet price making by bargaining is now in many fields looked at more or less askance, and in some fields it is condemned by law, and both bargaining and price reductions are under some circumstances called unfair competition. While the cry of unfair competition in such cases is sometimes raised by the competitors themselves, or in

their behalf, it is as often used by persons whose chief interest is in the consumers.

Price making by bargaining was first strongly condemned in the field of railway transportation. Transportation prices had often been fixed by bargaining, like other prices, for the larger shippers and for the better bargainers. Here bargaining began to be felt as unfair, primarily to those shippers that paid the higher rates, and it was forbidden by law some years ago. More recently the notion of unfairness has extended to some kinds of reduction in the prices of commodities. Manufacturers who fix resale prices for their branded and trade-marked goods, and some dealers in such goods, protest that dealers who cut the prices so fixed are unfair to their competitors and to the manufacturers. On the other hand, many view this fixing of resale prices by manufacturers as itself unfair. The price reductions that are more widely condemned are those that are conceived as temporary and for the purpose of later charging prices based on monopoly, and so unduly high. In the special railway rates referred to, the persons first thought of as injured are the weaker shippers, who have to pay the higher rates; but the popular feeling of injustice, while based partly on the injury to such shippers, relates perhaps more to the damage which the consumers will suffer when the strong shippers have the field to themselves and can fix the consumer's price at a high level. Of similar origin is the condemnation of local price cutting, where the apparent purpose is to destroy a relatively weak competitor. The elimination of weak competitors has been regarded as a normal incident of competition, but their elimination by prices lower than cost is felt to be a public calamity and a wrong as soon as it is found to be followed by prices higher than before.

On this point Prof. W. H. S. Stevens says:[1]

"Fair competition," in an economic sense, signifies a competition of economic or productive efficiency. On economic grounds an organization is entitled to remain in business so long and only so long as its production and selling costs enable it to hold its own in a free and open market. As the productive and selling efficiency of competitors increases, marginal concerns which are unable to keep pace will gradually lose their market and ultimately discontinue business. But in such an elimination there is nothing not economically fair to all concerned. If all have an equal chance to survive, it is economically proper that those failing through lack of efficiency should be destroyed. The community is entitled to the most efficient service that can be given. Inefficient organizations constitute a burden to the community, and no justification can be found for their continued existence.

Unfortunately competition is not always conducted under such conditions of equal opportunity in a free and open market. Productive and selling efficiency alone do not always permit an organization to survive, owing to the introduction

[1] Political Science Quarterly, June, 1914, pp. 282, 283.

of methods and practices which destroy the freedom of the market, which hamper the productive or selling efficiency of other units, and which prevent efficient potential competitors from becoming actual rivals. Such artificial restrictions are clearly unfair, since they hinder or prevent other organizations from competing to the extent which their productive and selling efficiency may warrant. If there be a sound basis for competition, it lies in the preservation of the economically efficient and the destruction of the inefficient. It follows that methods which destroy the efficient along with the inefficient are economically unjustifiable and must be regarded as unfair.

This bases the distinction of fair and unfair competition on considerations of economic advantage to the public. Prof. John Bates Clark takes the same view:

The victory of the efficient is something society can not afford to do without, however much it might wish to spare the vanquished. So that in this case it is, after all, the means used and not the purpose that tilts the scale of judgment from approval to condemnation, and "unfair competition" comes to mean virtually any practice whose natural result is to make survival depend on other qualities than industrial efficiency.[1]

To the same effect also speaks Prof. Henry Rogers Seager.[2] After enumerating certain advantages of the trusts—saving in selling expense, saving in cross freights, and others—which he declares to be legitimate, he enumerates three lines of policy (the obtaining of discriminating railroad rates, local price discrimination, and exclusive-dealing contracts), which, he says, critics of the trusts charge "are squarely opposed to the general interest and therefore illegitimate."

USE OF THE TERM "UNFAIR COMPETITION" AND OTHER LIKE TERMS.—The phrase "unfair competition," used at first in a merely descriptive way, has gradually come to a quasi-technical employment in economic discussion.[3] In the index of volume 1 of the Reports of the Industrial Commission, published in 1900,[4] it is used to cover statements of witnesses on "destructive competition" in the sense of severe and continued price cutting; on "illegitimate competition," in the sense of "cutting of prices below the cost of production"; and on local price discrimination. The exact phrase "unfair competition" appears to have been used in only one case by a witness reported in that volume, and then on the suggestion of a member of the commission.[5]

[1] The Control of Trusts, by John Bates Clark and John Maurice Clark (1912), p. 103.
[2] Introduction to Economics (third ed., 1905), p. 491.
[3] In a letter of Apr. 18, 1879, to the chairman of the special committee on railroads of the New York Assembly (Hepburn Committee), signed by W. H. Vanderbilt, president of the New York Central & Hudson River R. R. Co., and H. J. Jewett, president of the New York, Lake Erie & Western R. R. Co., the phrase "unfair competition" was applied to the action of the Grand Trunk Ry. in making through rates between Liverpool and Chicago less than the ordinary water and rail rates combined. In the same letter the phrase "unfair dealer" was applied to "anyone who offers his goods at or below cost." (Proceedings of the Special Committee on Railroads of the New York Assembly (1879), Vol. I, pp. 50, 57.)
[4] Report of the Industrial Commission, vol. 1, p. 1275.
[5] Ibid., p. 623.

In the passage quoted above from Prof. Clark's book, which was published in 1912, the phrase "unfair competition" is put in quotation marks to indicate its quasi-technical use. But Prof. Seager, writing some years earlier, says "illegitimate"; and this and like descriptive and explanatory words—"unfair practices," "destructive competition," "predatory competition," etc.—have till recently been often used in place of "unfair competition."

Few attempts have been made by economic writers to define "unfair competition," or to enumerate fully the kinds of conduct they consider it to include. Only incidentally and by illustration have such writers usually indicated the meaning they give to such a term.

Francis Walker, in a paper read at the meeting of the American Economic Association in 1909, mentioned as illustrations of "unfair competition" or "unfair methods of competition": Local price cutting, preventing competitors from getting supplies and facilities, bogus independent companies, espionage by corrupting employees, and "certain kinds of exclusive contracts."[1]

Prof. F. W. Taussig, in his Principles of Economics (1911), speaks of "the devices of 'unfair' competition—railway favors, discriminations in prices, factors' agreements, advertising devices."[2] Under "discriminations in prices" Prof. Taussig includes local price cutting and cutting the price of one article of a combination's line "in order to bankrupt a rival who produces that one." Apparently he also meant to include, or at least to bring under the same degree of censure or question, simple "cutthroat competition" for the purpose of eliminating rivals—"sales at prices ruinously low, designed to force the rival into bankruptcy or absorption."[3] The factors' agreement Prof. Taussig defines as "a contract with a dealer (wholesale or retail) by which he agrees to sell only goods produced by the combination."[4] Of "advertising devices" Prof. Taussig says: "Mere effrontery in puffing your wares is an important factor in modern trade." Advertising "is often a means of useful competition. But sometimes it is a weapon of destructive competition. * * * Plentiful cash is the *sine qua non* of an effective advertising campaign. The large producer, or would-be monopolist, has here again a tactical advantage. The same is true of other devices for popularizing your goods—prizes, premiums, gifts, pictures, what not. These delude the purchaser into the belief that he is getting something for nothing. Like mendacious advertising, they rest on the gullibility of mankind and are effective in proportion as they are carried out on a large scale."[4]

[1] Publications of the American Economic Association, third series, Vol. XI, No. 1 (Papers and Discussions of the Twenty-second Annual Meeting), pp. 291, 308–310, 319.

[2] F. W. Taussig, Principles of Economics, vol. 2, p. xv; contents of ch. 63.

[3] Ibid., vol. 2, p. 427.

[4] Ibid., vol. 2, p. 428.

John Bates Clark, in "The Control of Trusts" (1901), enumerated three kinds of "unfair dealing," as follows:

> The first is local discrimination in prices. * * *
> Again, discriminations may be made, not between different localities, but between different grades of goods on the general price scale. * * *
> Thirdly, the trust may refuse to sell goods at all under certain conditions.

Prof. Clark also condemned railroad discriminations in connection with the discussion of the above methods.[1]

J. B. and J. M. Clark, in The Control of Trusts (1912), make no formal enumeration of the practices they include under the term "unfair competition," but they appear to have especially in mind local price cutting, single-commodity price cutting, and factors' agreements (exclusive-dealing requirements).[2] "Unfair practices" and "destructive competition" are used in this book as synonyms of "unfair competition."[3] J. B. Clark, one of the authors of this book, does not seem to use the phrase "unfair competition" in his book entitled "The Problem of Monopoly" (1904); but the three practices just referred to are there condemned under the term "cutthroat competition,"[4] and the same condemnation covers the obtaining of railroad discriminations.[5]

Charles R. Van Hise, president of the University of Wisconsin, in Concentration and Control (1912) uses the phrase "unfair competition" only incidentally. It does not occur in the index, except in a reference to the statement that in Germany the laws are "very severe against unfair competition"; and an examination of the text has revealed no other use of it but the following: "The grosser forms of unfair competition, such as espionage of business competitors, bribing of men in the employ of competitors, etc., should be prohibited."[6]

In one case he uses the phrase "illegitimate competition" to cover fighting brands, bogus competitors, price discrimination, exclusive contracts, and espionage.[7] Of "unfair practices," he says:[8] "Unfair practices must be prohibited, and unfair advantages must not be permitted. Only so will it be possible to retain competition." Some of the more important practices which he here proposes to prohibit are:

> Common-carrier discriminations.
> Bogus independents.
> Espionage on competitors and bribery of competitor's employees.

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[1] John Bates Clark, "The Control of Trusts" (1901), pp. 33–34, 64, 74, and 76.
[2] J. B. and J. M. Clark, The Control of Trusts (1912), p. 96, chapter summary; pp. 96, 97.
[3] Ibid., p. 31, chapter summary; p. 96, chapter heading and summary; pp. 96, 97.
[4] J. B. Clark, The Problem of Monopoly, pp. 33–36, 48, 49.
[5] Ibid., pp. 32, 33.
[6] Charles R. Van Hise, Concentration and Control, p. 226.
[7] Ibid., p. 143.
[8] Ibid., pp. 225, 226.

Exclusive-dealing arrangements.
Local price cutting.

In other places Dr. Van Hise mentions as "unfair practices" the following:[1]

Misrepresenting competitor's goods.
Selling machines which resemble those of competitors "at a very low figure."
Purchase [and suppression] of patents and preventing inventors "from putting their inventions on the market."
Unjustifiable suits and threats of suits, to intimidate competitors.
Distributing, for purposes of intimidation, statements regarding the number of competitors who have failed.

As "unfair methods," without which, "it is asserted, with the support of a pertinent array of facts, that the great combinations could not exist," Senator Theodore E. Burton, in "Corporations and the State" (1911), names local price cutting, one-commodity price cutting, and exclusive-handling requirements.[2]

Prof. Edward Dana Durand, in his recent book, The Trust Problem,[3] mentions railroad discriminations, price discriminations, bogus independents, and exclusive patronage requirements as types of unfair competition. He expresses the opinion, however, that "in by no means all industries is it possible for a combination, however comprehensive, to add much to its power by unfair competitive methods."[4] On this point he is at odds with those who hold that the power of a monopolistic combination "rests mainly on unfair competitive methods or on special privileges.[5] He says:[6]

The Tobacco Trust, I feel sure, was far from owing the whole of its power to unfair competitive methods or to special monopoly privileges. Freight charges on tobacco are such a small element in cost that, even if the trust had special favors in this respect, they could have counted but little in competition. The trust did make considerable use of price discrimination as a method of warfare against competitors. It maintained bogus independent companies. It sought to make exclusive contracts with dealers. The conditions of the trade, however, are such that these practices could not wholly account for monopoly power. The ability of the trust to maintain its dominant position was largely due to its readiness to buy up competitors at good prices, and to the readiness of competitors to submit to the amalgamation process.

Prof. J. W. Jenks, in "The Trust Problem," applies the phrase "destructive competition" to local price cutting.[7]

Prof. Lewis H. Haney, in "Business Organization and Combina-

[1] Charles R. Van Hise, Concentration and Control, p. 190.
[2] Theodore E. Burton, Corporations and the State (1911), p. 110.
[3] Edward Dana Durand, The Trust Problem, 1915, pp. 17, 19, 20, 21, 22.
[4] Ibid., p. 21.
[5] Ibid., p. 11.
[6] Ibid., p. 20.
[7] J. W. Jenks, The Trust Problem (rev. ed., 1909), p. 66.

tion" (1913), lists certain methods of "illegitimate" competition as follows:

Bribery of the employees of competitors.
Abuse of patents.
Secret control of so-called competitors.
Price discrimination.
Discrimination in granting credit.
Preventing purchasers from dealing with competitors.

At another place Prof. Haney says:

But competition may also be legally or ethically illegitimate. * * * Rebates, bribery, secret control of nominally competing plants, and the like, have existed under a system of "unrestrained" competition, and such practices are not only wrong but unlawful. Refusing to sell to retailers who also buy of competitors and cutting prices on certain special articles or certain grades of product may or may not be unlawful, but the common sense of the community or society regards such practices as wrong. Competition by terrorism is no beneficent thing. It is piracy.[1]

A list of unfair competitive methods was given in a recent article by Prof. William S. Stevens, as follows:[2]

Classified according to their elementary characteristics, it is possible to distinguish the following 11 forms of unfair competition:

I. Local price cutting.
II. Operation of bogus "independent" concerns.
III. Maintenance of "fighting ships" and "fighting brands."
IV. Lease, sale, purchase, or use of certain articles as a condition of the lease, sale, purchase, or use of other required articles.
V. Exclusive sales and purchase arrangements.
VI. Rebates and preferential contracts.
VII. Acquisition of exclusive or dominant control of machinery or goods used in the manufacturing process.
VIII. Manipulation.
IX. Blacklists, boycotts, white lists, etc.
X. Espionage and use of detectives.
XI. Coercion, threats, and intimidation.

Section 3. List of methods of competition which have been regarded as unfair.

Since the methods of competition are of infinite variety, it is obviously impossible to specify all that may be regarded as unfair. The following list is believed, however, to cover most of the methods that have been so condemned by economic writers and publicists and have thus far attained any considerable importance. Not every method listed will seem unfair to all people, or perhaps to most. Sometimes, indeed, complaint is noted of two lines of conduct, one of which is the opposite of the other. Fixing resale prices and cutting fixed resale prices, defining the channels of trade and refusal

[1] Lewis H. Haney, Business Organization and Combination, pp. 366, 371–372.
[2] Political Science Quarterly, June, 1914, p. 283.

to observe defined channels, each is felt as injurious by one group or another, and is therefore condemned by it as unfair.

Local price cutting.
One-commodity price cutting.
Price reductions in general.
Use of trading stamps, coupons, and the like.
Excessive credits.
Reductions of price for quantity.
Special advantages in transportation (rebates, etc.).
Fixing resale prices.
Bogus independents.
Exclusive-dealing requirements.
Full-line forcing.
Inducing breach of contract.
Enticement of competitors' employees.
Espionage by corruption and bribery.
Secret commissions.
Misrepresenting competitors.
Abuses in advertising.
Passing off goods for those of another.
Shutting off competitors' credit.
Shutting off materials, supplies, or machines from competitors.
Acquiring stock in competing companies for purpose of reducing or destroying competition.
Wrongful and malicious suits.
Intimidation.
Fixing channels of trade.

Section 4. Local price cutting.

The buyers of most articles are more numerous than the sellers, and a reduction of the price seems to benefit more people than it injures. In general, therefore, it is naturally regarded as a public benefit. But a large corporation may cut its prices below cost till its competitors are destroyed and then recoup its losses by making its prices higher than before. It may make its reduction only in localities reached by a certain competitor which cover but a small part of its own field, and so may constantly secure a profit on its total business, while the competitor meets ruinous losses. The ultimate result of such a process is high prices, based upon a practical monopoly. When this result is observed the process is often felt to be injurious to the general interest. At the same time sympathy for the outmatched competitors reenforces the dislike of consumers for the final high prices, and this method of competition is frequently pronounced unfair.

The criticism does not usually extend to sales of damaged or defective stock, nor to the "special sales" which merchants advertise, nor to price cutting which is not conceived to be directed toward establishing a monopoly.

Speaking of local price cutting, Louis D. Brandeis says: "With the exception of the railroad rebate, cutthroat competition was the most powerful of all the weapons which the Standard Oil Co. employed. It was the most powerful of all weapons employed by the Tobacco Trust. The Standard Oil Trust would cut the price in the districts where a competitor established himself, and thus destroy him, meanwhile reimbursing itself for the cut in that region by charging high prices elsewhere."[1] In a report on the petroleum industry, a former Commissioner of Corporations criticized the Standard Oil Co. on account of "startling discriminations in prices," and said: "It is evident that the Standard charges a price which is proportionate to the extent of its monopoly in a given place and reduces prices in proportion to the degree of competition which it may meet." According to this report the Standard's prices for medium-grade illuminating oil, after deducting freight, in December, 1904, varied in cities of more than 100,000 inhabitants from 6.4 cents at Cincinnati to 14.4 cents at Denver. The price in New York City, less freight, was 4 cents higher than in Cincinnati and 2½ cents higher than in Philadelphia.[2]

In its suit against the United States Steel Corporation the Government sought to prove unfair competition by putting in evidence the following extract from the minutes of the Carnegie Steel Co. (subsidiary of the United States Steel Corporation) under date of September 23, 1902:

> The Tin Plate Co. are covered by contracts up to the 1st of December. At that time they anticipate making a heavy cut in prices, which they think will put 90 per cent of their competitors out of business. If this move proves as successful in securing business as is expected the Sheet Steel Co. will probably reduce to an equivalent basis. Both companies figure that they can then run full for at least the first half of next year.[3]

A complementary practice is that of bidding up prices of materials in localities where competitors appear as buyers. Such a practice was complained of by a former Commissioner of Corporations with respect to the Standard Oil Co., which was alleged to have forced several independent pipe lines out of business by paying extravagant prices for crude oil in the territories where they operated.[4] Crude-oil producers have also complained that when the Standard had got hold of

[1] To Prevent Discrimination in Prices and to Provide for Publicity of Prices to Dealers and the Public: Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 63d Cong., 2d and 3d sess., on H. R. 13305, pp. 4, 5.

[2] Report of the Commissioner of Corporations on the Petroleum Industry, Pt. II, pp. xxxviii, xxxix, 451.

[3] United States v. U. S. Steel Corporation and others. In the District Court of the United States for the District of New Jersey, October term, 1914. Brief for the United States, Pt. II, p. 354.

[4] Report of the Commissioner of Corporations on the Petroleum Industry, Pt. I, p. 25.

the competing lines, the "premiums" on crude oil in their territory were taken off.[1]

Section 5. One-commodity price cutting.

A company that sells several articles or several brands can cut the price of one article or brand and still make a large profit on its business as a whole, while destroying the profits of competitors whose line is less varied. A brand on which the price is cut in this manner is often called a "fighting brand." In a report on the tobacco industry a former Commissioner of Corporations complained of certain competitive practices, which may be concisely summarized as follows: The American Tobacco Co. dominated the cigarette business in the early nineties, but its plug business was comparatively small. It set about securing a dominating position in this line also. As a weapon in this campaign it used one brand of plug tobacco, Battle Ax, the retail price of which was cut from 50 to 30 cents a pound, and the wholesale price of which, less internal-revenue tax, was put at one time as low as 7 cents. In territories where certain well-known rival brands, such as Lorillard's Climax and Liggett & Myer's Star, were favorites, men were sent through the country distributing samples; they presented a plug of Battle Ax to every man they saw. During the four years 1895, 1896, 1897, and 1898, the company made a net loss on its plug business of $3,300,000. But it effected its purpose by obtaining during these years and the years immediately following a substantially monopolistic control of the plug-tobacco market.[2]

In the suit of the United States against the American Tobacco Co., the court was asked by the independent tobacco manufacturers to restrain the new corporations after the dissolution—

> From giving away, selling at or below the cost of manufacture and distribution, any of its products, or adopting any other method of cutthroat competition for the purpose of destroying or of acquiring the business or trade of a competitor.

Louis D. Brandeis refers to this and other restraints asked for by the independents as "restraint upon unfair competition."[3]

Dealers in a commodity sometimes complain of its use as a "leader" by other dealers, of whose trade it is a comparatively unimportant part. Thus, the president of the American Surgical Trade Association said in 1914: "One member has complained very bitterly of pharmaceutical houses making a practice of selling sur-

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[1] Report of the Industrial Commission, vol. 1, p. 394, 395.

[2] Report of the Commissioner of Corporations on the Tobacco Industry, Pt. I, pp. 96, 365–375.

[3] Control of Corporations, Persons, and Firms Engaged in Interstate Commerce: Report of the Committee on Interstate Commerce, United States Senate, 62d Cong., Pursuant to S. Res. 98, with Hearings, Digest, and Index; pp. 1221, 1222.

gical instruments at, and below, cost, as a leader, in the hope of being able to sell the doctor a line of their own preparations."[1]

Section 6. Price reduction in general.

Any reduction of price is often felt to be unfair by manufacturers and dealers who are interested in maintaining a higher price. Thus, the president of the American Surgical Trade Association said in his annual report for 1914:

> There has come directly under my observation but one extremely flagrant case of price cutting on surgical instruments. In this case a physician in one of the larger of our north Texas towns sent out a list on which he invited bids. Several houses quoted regular list prices less 10 per cent for cash, while one of the eastern houses quoted as high a discount as 10 per cent and 5 per cent for cash, but even this did not get the order, a Cincinnati institution having quoted a flat dollars-and-cents price which drew the order. The house which quoted the 10 per cent and 5 per cent for cash offered as an apology that this doctor had written them on numerous occasions for prices, but that they were never able to draw an order on the regular 10 per cent cash discount, and consequently they, in this particular instance, simply took a chance by quoting an extra 5 per cent. This is a theory of eastern competition which southern and western houses find very hard, and, we think, very unfair.[2]

Section 7. Use of trading stamps, coupons, and the like.

The American Tobacco Co. has made effective use of the coupon or premium system—giving with each package of certain goods a coupon, tag, or other mark, redeemable in "premiums." The system is said to lend itself readily to local price discrimination, and to be especially effective in making sales because it enlists the interest of the whole family in the kind and quantity of tobacco consumed by the user. For years the business of the tobacco combination along this line was so great that it maintained a separate corporation to redeem its coupons. It is alleged that a small company can not effectively compete with a large one in applying the premium system, and that this system tends toward monopoly, under present industrial conditions. It has therefore come to be widely condemned as unfair. Says one writer, addressing the members of the National Association of Retail Druggists, "Do you want to stop the tobacco-drug trust from strangling you with a so-called coupon system that is nothing less than a trust-issued currency?"[3]

The dislike of the system among merchants is not confined, however, to the smaller sort. Marshall Field & Co. were reported to have announced on April 9, 1915, that all merchandise involving the distribution of profit-sharing coupons would be dropped from their

[1] President's report, American Surgical Trade Association, June 15, 1914: Proceedings of the Fourteenth Annual Meeting of the American Surgical Trade Association, pp. 8, 9.

[2] Proceedings of the Fourteenth Annual Meeting of the American Surgical Trade Association, p. 9.

[3] Interstate Trade: Hearings before the Committee on Interstate Commerce, United States Senate, 63d Cong., 2d sess., on Bills Relating to Trust Legislation, p. 1419.

wholesale and retail business; and in this connection, according to the Journal of Commerce, "a member of the firm of R. H. Macy & Co. authorized a statement as follows: 'We are opposed to all profit-sharing coupon schemes or any other promise to give something for nothing.'"[1]

Section 8. Excessive credits.

A bill submitted to the Senate Committee on Interstate Commerce in 1914 provided:

* * * the sale or offer for sale of commodities upon * * * terms which extend or promise to extend the date of final payment beyond one year from the date of actual shipment of the commodities sold or offered for sale, shall be prima facie proof of the purpose or intention to injure or destroy competitors.[2]

The report of a former Commissioner of Corporations on the International Harvester Co. criticized the long credits given by that company on certain kinds of farm machinery, and said:

There is a very general complaint from competing manufacturers, especially the smaller concerns, that the International Harvester Co. uses these long credits as a means of wresting trade from its rivals. * * * There is no doubt that the smaller competitors of the International Harvester Co. find this situation very difficult to meet, because their financial resources are generally inadequate to do business in that way. The International Harvester Co. is enabled to pursue this policy of granting long terms because of the large resources which it acquired through combination.[3]

Section 9. Reductions of price for quantity.

It is usually admitted that large buyers should have lower prices than small buyers, but persons who admit this sometimes complain that the actual differences are unfairly large. Thus the secretary of the National Federation of Retail Merchants says:

I recognize the fact, as do all small business men, that the man who buys in large quantities is entitled and should be entitled to buy at a less price, but that difference in price, especially when both transactions are cash, should not amount to as much as would be a gross reasonable profit. * * * To avoid having the mail-order house establish a competitive factory, the manufacturer often makes the mail-order house a price low enough to persuade him not to establish his own factory, and I haven't the slightest doubt that in thousands of cases to-day the mail-order house, by reason of this indirect intimidation of the manufacturer is buying many items of merchandise at a less price possibly than they can be manufactured. * * * The question I particularly desire to ask you at this time is, would this section 5 cover this kind of unfair competition? It is the most serious and far-reaching unfair competition, we believe, that the small business man has to deal with.[4]

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[1] The Journal of Commerce and Commercial Bulletin, New York, Apr. 10, 1915, p. 5.

[2] Interstate Trade: Hearings before the Committee on Interstate Commerce, United States Senate, 63d Cong., 2d sess., on Bills Relating to Trust Legislation, pp. 1064, 1065.

[3] Report of the Commissioner of Corporations on the International Harvester Co., pp. 287, 288. See also pp. 320–323 of that report.

[4] Interstate Trade: Hearings before the Committee on Interstate Commerce, United States Senate, 63d Cong., 2d sess., on Bills Relating to Trust Legislation, pp. 1419, 1420.

Vincent J. Farley, publisher of a tobacco-trade publication, says:

> Here is an example: A manufacturer of a product nationally advertised, in great demand, allows a lower price to a jobbing firm buying $100,000 worth at a time. That jobbing firm will sell to the retail trade at a lower price than the competing and less-favored jobbers can buy wholesale. As a result you have a monopoly in the jobbing business.[1]

There is some support for the proposal that each kind of manufactured goods shall be sold at a uniform price per unit. One man says:

> Force every manufacturer of an article entering into interstate commerce to name a price on that article at his factory door and make a good healthy penal sentence fall on anyone quoting or billing * * * any other price.[2]

Louis D. Brandeis believes that in a comparatively few years the law will forbid the giving of quantity discounts, "because," he says, "I think it is fraught with very great evil. The practice of giving quantity discounts menaces the small retail business."[3] In another place Mr. Brandeis says:

> If we wish to preserve the small dealer from destruction we may be compelled to require that all retailers, large or small, be enabled to purchase the same article at the same price, applying the one-price policy throughout. Many enlightened manufacturers have already abandoned the practice of giving quantity discounts, coming to this conclusion, that if they wish to preserve the small retailer they must do so.[4]

Section 10. Special advantages in transportation (rebates, etc.).

In several industries the dominant producers control the only or the best available means of transportation. For anthracite coal, the control of the mines rests in the same hands as the control of the railroads over which it is hauled to market. In a suit brought by the Government its officers complained that the roads kept down the value of coal at the mines and recouped themselves by very high freight rates, and thus kept down the value of coal land till they had bought up practically all of it. Moreover, the principal anthracite railroad, the Reading, it was asserted, granted rebates to its associated coal company, the Philadelphia & Reading Coal & Iron Co., by carrying its freight charges, to the extent of millions of dollars, as a debt without interest on its books.[5]

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[1] Trust Legislation: Hearings before the Committee on the Judiciary, House of Representatives, 63d Cong., 2d sess., on Trust Legislation, p. 534.

[2] Interstate Trade: Hearings before the Committee on Interstate Commerce, United States Senate, 63d Cong., 2d sess., on Bills Relating to Trust Legislation, p. 1436. See also ibid., p. 1110.

[3] To Prevent Discrimination in Prices and to Provide for Publicity of Prices to Dealers and to the Public: Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 63d Cong., 2d and 3d sess., on H. R. 13305, p. 45; statement of Louis D. Brandeis, Jan. 9, 1915.

[4] Ibid., p. 43.

[5] United States *v.* Reading Co. et al. In the District Court of the United States, Eastern District of Pennsylvania. Brief for the United States (May, 1914), p. 55.

A similar criticism was made by a former Commissioner of Corporations with respect to the iron-ore trade:

> The dominating position in the ore industry enjoyed by the Steel Corporation * * * is heightened because of its very marked degree of control of the transportation of ore in the Lake Superior district. The corporation owns two of the most important ore railroads. * * * The net earnings of these ore railroads, which are chiefly from the ore traffic, are phenomenal. This has the practical effect of reducing the Steel Corporation's net cost of ore to itself at upper lake ports, and, on the other hand, of increasing that cost to such of its competitors as are dependent upon the corporation's railroads for transportation.[1]

A more widespread condition is rate discrimination in favor of powerful interests on public means of transportation which they do not directly control. This is a question which State legislatures took up nearly 50 years ago, and which for 30 years has had the attention of Congress. It is frequently asserted that it was railroad discrimination that gave the Standard Oil Co. its first predominance and that gave it the wealth with which it afterwards built its private means of transportation. Discriminations so enormous as to absolutely crush out all competition have probably been eliminated by the law, but discrimination by various indirect means has not been wholly eliminated. Less than 10 years ago a former Commissioner of Corporations found and severely condemned freight arrangements which shut out competitors of the Standard Oil Co. from extensive regions.[2] From time to time the Interstate Commerce Commission brings to light discriminations which, if smaller than those of many years ago, are far from unimportant.

Section 11. Fixing resale prices.

Fixing of resale prices by manufacturers is regarded by some as an unfair method of controlling the market. Bruce Wyman, formerly professor of law at Harvard University, wrote as follows in an article on "Unfair competition by monopolistic corporations":

> But there are other policies by which many trusts have gained their dominating position, the illegality of which has not been so clear. Such an excluding policy as the refusal to sell to retailers, who persist in buying anything of a rival manufacturer, is one example. * * * Fixing the prices at which the product may be resold is in the same class. The monopolies which are keeping their position by these policies have no economic justification, and for them there can be no defense. I believe that the law should punish such discriminatory practices as these so severely that no one would take the risk of employing them.[3]

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[1] Report of the Commissioner of Corporations on the Steel Industry, Pt. I, p. 60.

[2] Report of the Commissioner of Corporations on the Transportation of Petroleum, May 2, 1906; many passages, especially the summary, pp. 1–28.

[3] The Annals of the American Academy of Political and Social Science, vol. 42, July, 1912, p. 69.

On the other hand, some hold that refusal to adhere to resale prices fixed by manufacturers is unfair. Louis D. Brandeis is one of the best-known advocates of this position. He says that to sell an advertised article below its regular price "is not only unfair, but it is in effect a slander of the reputation of the article."[1] A department store makes a leader of such an article, he says, and thereby ruins the trade in it. The small stores will cease to sell it when they can not sell it at a profit, and then the department stores will drop it also when it has lost its value for advertising purposes.[2]

Special complaint against such price cutting is made on behalf of the small retailers. "The trust department stores, chain stores, and mail-order houses are cutting prices on standard branded articles which are in great public demand. They use it as a bait against the independent dealer." The small dealer suffers, it is said, and sometimes is driven out of business.[3]

At the meeting of the Chamber of Commerce of the United States of America in February, 1915, a special committee presented "A Brief Concerning the Maintenance of Resale Prices." The brief presents arguments on both sides and avoids the formal and definite presentation of an opinion; but it is the evident purpose of the committee to support the fixing and maintenance of resale prices.

Section 12. Bogus independents.

The popular feeling against monopoly is so strong that many people dislike to buy from a trust. Prudent men therefore like to avoid the appearance of monopoly, however much they desire the substance. So they sometimes maintain separate organizations to simulate competition, and to secure the trade of persons who would avoid them if the facts were known.

This practice has been found and condemned with respect to the petroleum and harvesting-machine industries by former Commissioners of Corporations. Thus, when an independent oil company began to sell in a particular neighborhood, the Standard Oil Co., it is alleged, would put in another, professedly independent but actually controlled by itself. In reducing prices on oil sold under its own name it would keep a step behind its competitor; but the bogus independent would keep a step ahead till the real independent was

[1] To Prevent Discrimination in Prices and to Provide for Publicity of Prices to Dealers and to the Public: Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 63d Cong., 2d and 3d sess., on H. R. 13305, p. 15, statement of Louis D. Brandeis, Jan. 9, 1915.

[2] Ibid., pp. 16, 23.

[3] Interstate Trade: Hearings before the Committee on Interstate Commerce, United States Senate, 63d Cong., 2d sess., on Bills Relating to Trust Legislation, p. 1449, statement of Nicholas Ehrlich, of Brooklyn, N. Y., president of the Independent Retail Tobacconist Association of America, Brooklyn branch.

put out of business.[1] Complaint was made that in several instances the International Harvester Co. concealed its control of formerly independent plants and held them out to the public as still independent for a year or two years after it had acquired them.[2]

The Government in a suit against the American Press Association, which furnished four-fifths of the plate matter used by newspapers in the United States, complained that—

> It maintained for many years in different cities of the United States houses known under other names and understood by newspapers generally to be independent concerns. Its plan of operation was that if it did not desire to sell to a customer at a certain price, or if it lost a customer by reason of the prices it was charging, it would have one of these houses procure the business at such price as might be necessary to obtain it.[3]

A former Commissioner of Corporations complained that the American Tobacco Co. made frequent use of bogus independents for purposes of competition. One instance out of many reported is that of H. N. Martin & Co., of Louisville, Ky., two-thirds of whose capital stock was bought in 1903 by persons connected with the American Tobacco Co. The change of control was kept secret, and H. N. Martin & Co. was caused to cut its prices below cost, in an aggressive campaign against several independent plug-tobacco companies of the Middle West. By 1905 the Martin company was bankrupt; but the cost of the two-thirds interest to the American Tobacco Co. people was small in comparison with the damage they had done to others.[4]

A former Commissioner of Corporations complained that the Standard Oil Co. sometimes used bogus independents to bid up the price of crude oil in order to kill off independent pipe lines.

> The object obviously is to prevent clamor on the part of the producers throughout the entire field, who, if the Standard paid such premiums in its own name, might naturally demand the same prices for their product as were paid in the limited areas affected by the competition of rival lines.[5]

Section 13. Exclusive-dealing requirements.

Powerful companies can often increase their power by discriminating against persons who buy from their competitors. The discrimination may take the form of higher prices, or the form of refusal to sell at all. Perhaps the best known case is that of the United Shoe Machinery Co., which leases certain of its machines, on the condition that the lessee forfeits his right to use them if he uses

[1] Report of the Commissioner of Corporations on the Petroleum Industry, Pt. II, pp. 57, 58, 668.

[2] Report of the Commissioner of Corporations on the International Harvester Co., pp. 296–299.

[3] United States *v.* Western Newspaper Union et al.; petition, quoted in Hearings before the Committee on the Judiciary, House of Representatives, 63d Cong., 2d sess., on trust legislation, p. 1666.

[4] Report of the Commissioner of Corporations on the Tobacco Industry, Pt. I, p. 110.

[5] Report of the Commissioner of Corporations on the Petroleum Industry, Pt. I, p. 26.

any similar machines made by others. This has for years been a matter of loud protest, both from the company's competitors and from shoe manufacturers.

A former Commissioner of Corporations complained that the American Tobacco Co. formerly gave a special discount of 6 per cent to certain jobbers on condition that they handle no cigarettes or tobacco but those of its manufacture.

This agreement was attacked in the courts of Massachusetts, and the American Tobacco Co. was compelled to give up this method of exclusive control of jobbing houses in New England territory.[1]

Complaint was also made to the Industrial Commission that the Continental Tobacco Co. refused altogether to sell to some jobbers because they sold goods of other manufacturers.[2] When the tobacco combination was dissolved the independent tobacco manufacturers asked the court to place certain restraints on the corporations which succeeded to its business. Among them was the following:

From refusing to sell to any jobber any brand of snuff or cigarettes or smoking or chewing tobacco manufactured by it, which is indispensable in the particular market. It should also be restrained from giving any rebates, allowances, or other special inducements to those who use its goods exclusively or give preference to them over the goods of competitors.[3]

The International Harvester Co. formerly used a commission-agency contract, by which dealers were required, under heavy penalties, to handle the company's harvesting machinery exclusively. A former Commissioner of Corporations said on this subject in 1913:

In 1905, however, at a time when antimonopoly proceedings against the company were threatened in several States, the exclusive clause was eliminated from the contract and has not been restored since. * * * Since the elimination of the exclusive clause from dealers' contracts other means have not infrequently been employed to secure the same end. In a considerable number of cases reported to the Bureau from different parts of the United States salesmen of the International Harvester Co. have endeavored to prevent the handling of goods made by competing manufacturers by threatening to discontinue the dealer's agency for the harvesting machines of the International Harvester Co. * * * In the sections of the United States visited by agents of the Bureau it was found that many dealers hesitate to take up the sale of independent makes of harvesting machines, fearing to lose the contract for some brand of the International Harvester Co.'s machines if they do so.[4]

The power to impose such restrictions depends on control of some article which is necessary to the buyer or which it is at least advantageous to him to have. Often the power depends on a legal monop-

[1] Report of the Commissioner of Corporations on the Tobacco Industry, Pt. I, p. 311.
[2] Report of the Industrial Commission, Vol. XIII (1901), pp. 306, 334.
[3] Control of Corporations, Persons, and Firms Engaged in Interstate Commerce: Report of the Committee on Interstate Commerce, United States Senate, 62d Cong., Pursuant to S. Res. 98, with Hearings, Digest, and Index, p. 1222.
[4] Report of the Commissioner of Corporations on the International Harvester Co., pp. 304, 305.

oly, such as a patent or a trade-mark. But in other cases the power arises from monopolistic control of an industry.

Said an independent tobacco manufacturer a few years ago, speaking of the supposed absorption by the tobacco combination of 80 per cent of the tobacco trade of New England:

> That 80 per cent was made by four or five different factories controlling about 20 brands. No one of these factories could say, "If you do not handle our brands to the exclusion of all other brands in competition, you shall not have our brands at a price that you can make a profit on." But now one company, owning the 20 brands, all popular and well established, have that power.[1]

When the power exists, fear may produce a similar effect without any definite requirement. Says a manufacturer of motor cars:

> Let me now ask you to put yourself in the place of the independent manufacturer who has to purchase his raw material in a market, the control of which is dominated by an enormous overpowering factor in the lines of material he requires. He feels he has to buy his supplies from this trust; he has to pay the price asked. * * * He is afraid to buy of an independent small producer, even at possibly an equal or better figure, because he will surely have to come back some busy year and deal with the trust, when he fears he might find himself not in the preferred list of the trust's patrons.[2]

When the Eastman Kodak Co. formed its subsidiary, the General Aristo Co., to combine its own photographic-paper business with that of most of the other principal manufacturers, contracts were alleged to have been obtained with the European manufacturers of raw paper, binding them to sell to no one in America but the General Aristo Co. Independent manufacturers of sensitized paper said that paper for sensitizing was made only in Europe, and they complained that their business had been greatly interfered with by these contracts.[3]

Section 14. Full-line forcing.

This consists in a requirement that specified goods be handled on pain of refusal to furnish certain other goods or to give certain discounts or other favorable terms. It is often called full-line forcing, because a manufacturer of a particular brand of goods which is specially desired may insist that all his other goods, for which there is no special preference, shall be taken in lieu of those of rival makers as a condition of obtaining supplies of specially desired goods, thus attempting to force the dealer to handle the "full line" of the manufacturer. Thus, a former Commissioner of Corporations complained that salesmen of the International Harvester Co. used to

[1] Reports of the Industrial Commission, Vol. XIII, p. 339.

[2] Control of Corporations, Persons, and Firms Engaged in Interstate Commerce: Report of the Committee on Interstate Commerce, United States Senate, 62d Cong., Pursuant to S. Res. 98, with Hearings, Digest, and Index, p. 1296.

[3] Reports of the Industrial Commission, Vol. XIII, pp. liii, liv, 173–185, 191.

require dealers to order the so-called "new lines" (i. e., tillage implements, wagons, manure spreaders, etc.) as a condition of retaining the agency of some brand of the company's harvesting machines.[1]

Full-line forcing is closely analogous to the requirement of exclusive dealing. The latter forbids buying from competitors; the former requires that goods which might otherwise be bought from competitors be bought from the company which enforces the demand.

The exclusive-dealing requirement may cover only a single article and have no reference to any other, but the essence of the full-line forcing method is the tying of two or more articles together. This method is available, therefore, only to a seller who can, by control of a product necessary or desirable to dealers in a certain line, induce them to buy from him either products of which he has not exclusive control or products which they may not care to buy at all.

Section 15. Inducing breach of contract.

One of the bills for amendment of the Sherman law, submitted in 1914 to the Senate Committee on Interstate Commerce, proposed to forbid "unfair competition" and to define it to include, among other things, the following:

> Causing or attempting to cause any purchaser of the goods of any competitor to break any contract for purchase of such goods.[2]

Complaints have been made by manufacturers of harvesting machinery, both against the salesmen of the International Harvester Co. in its earlier years and against those of various companies before that company was formed, that they made a practice of following up their competitors and inducing farmers to back out of orders they had given.[3]

The Eastman Kodak Co., or its subsidiary, the General Aristo Co., is accused of attacking a competing manufacturer of photographic paper in such a way that the competitor's customers even shipped back goods they had received, with the result that he was bankrupted. The alleged method was a sudden refusal to sell, not merely to any dealer who bought the competitor's goods but even to any dealer who sold what he had on hand. William B. Dailey, another independent manufacturer of photographic paper, in presenting his complaint against the Eastman Kodak Co. to the Industrial Commission, related the case as follows:

> They were doing quite a large business, and the trust offered to buy them out, which offer they refused, not thinking it large enough. They had a very nice

[1] Report of the Commissioner of Corporations on the International Harvester Co., p. 306, et seq.

[2] Interstate Trade: Hearings before the Committee on Interstate Commerce, United States Senate, 63d Cong., 2d sess., on Bills Relating to Trust Legislation, p. 1169.

[3] Report of the Commissioner of Corporations on the International Harvester Co., p. 324.

plant in Newark and were doing a good business and making a good deal of money. They did not sell out, so the trust boycotted their goods. The trust did not boycott their goods as quickly as ours. They commenced on ours the 1st of January, 1899, and they did not throw this paper out until about the 1st of September, 1899; but, on the other hand, when they did throw them out they prohibited the dealers from selling their goods when the dealers had a considerable stock on hand. The trust did not buy that paper out, and the dealers could not sell it, and did not know what to do with it. Consequently those dealers who had not paid the bills shipped it back to the American Self-Toning Co. The goods were perishable, and great quantities came back on the company's hands, and they lost a great deal of money. The accounts being small, if they had undertaken to sue all, they would have had a couple of thousands of suits on hand, and it looked as if it would not pay them. They were losing all their business, and it was not very many months until they were in a receiver's hands.[1]

Section 16. Enticement of competitors' employees.

Accusations are not infrequently made of attempts to entice away important employees for the purpose of embarrassing a competitor's business. In the celebrated case of People *v.* Everest, a prosecution of certain persons alleged to have acted in the interests of the Standard Oil Co., it was one of the grounds of complaint that they had conspired to entice certain skilled employees from the Buffalo Lubricating Oil Co., particularly Albert A. Miller, superintendent of the construction of its work, and the only man in the company able to superintend the manufacture of oil.[2]

Section 17. Espionage by corruption and bribery.

A part of the "restraint upon unfair competition" which the independent tobacco manufacturers asked the court to impose on the new corporations into which the tobacco combination was dissolved was that:

> Each corporation which is to carry forward any part of the manufacturing business of the trust should be restrained * * * from espionage on the business of any competitor, either through bribery of any agent or employee of such competitor or obtaining information from any United States revenue official.[3]

Many have proposed specific legislative action to the same effect. Thus Senator La Follette's bill for amending the Sherman Act[4] proposed to declare every restraint of trade, under circumstances described, unreasonable and in violation of the act as to any party who—

> As the vendor, lessor, licensor, or bailor of any article spies upon the business of any competitor or secures information concerning his business, either through

[1] Reports of the Industrial Commission, Vol. XIII, p. 187.

[2] Standard Oil Trust Hearings, 50th Cong., 1st sess., House Report 3112, pp. 815, 816, 945, 946.

[3] Control of Corporations, Persons, and Firms Engaged in Interstate Commerce: Report of the Committee on Interstate Commerce, United States Senate, 62d Cong., Pursuant to S. Res. 98, with Hearings, Digest, and Index, p. 1221.

[4] Ibid., p. 1779.

bribery of an agent or employee of such competitor or of any State or Federal official, or by any illegal means whatsoever secures information concerning the competitive business.

One of the "methods of unfair competition" alleged against the Standard Oil Co. by a former Commissioner of Corporations was the maintenance of a most elaborate system of espionage over the business of independent oil concerns. Sometimes it set its regular men to spy; sometimes it hired special spies; but its chief source of information was reports from railroad employees, whom it bribed to disclose to it facts which it was their duty not to disclose. This system enabled the Standard to ascertain in just what markets its competitors were selling oil, often in advance of the arrival of shipments, and so to cut its prices at those points.[1]

Certain lumber dealers, doing a mail-order business, have complained that the retail lumber dealers' associations have used a similar plan against them.[2] The practice was admitted, as used against lumber manufacturers, by the defendants, representing retail lumber dealers' associations, in the Lumber Trust case, United States *v.* Hollis et al. The defendants alleged in their answer that lumber manufacturers generally concealed and denied their sales to consumers, "and that it was thus found necessary, on account of the secret and clandestine manner in which such sales were almost uniformly made by such wholesalers and manufacturers to the consumer, to employ detectives and other means to find out and ascertain the same."[3]

In the suit against the American Tobacco Co. the Government alleged that the superintendent of one of that company's subsidiaries had been convicted of attempting to bribe an employee of a competitor to give information about the competitor's business.[4] The Government also presented evidence of the company's tampering with internal-revenue officers to learn what internal-revenue stamps competitors bought.[5]

Until detected and complained of by an inspector of the Interstate Commerce Commission in 1912, the Reading Railway, according to the Government's complaint, regularly furnished the Reading

[1] Report of the Commissioner of Corporations on the Petroleum Industry, Pt. II, pp. 58, 669.

[2] Statement of Edward C. Roberts, president of the Gordon-Van Tine Co., Davenport, Iowa. Trust Legislation: Hearings before the Committee on the Judiciary, House of Representatives, 63d Cong., 2d sess., on Trust Legislation, p. 1764.

[3] United States *v.* Hollis et al. In the Circuit Court of the United States for the District of Minnesota, fourth division. In equity, No. 1079. The joint and several answer of the defendants, p. 101.

[4] United States *v.* American Tobacco Co. and others; in the Supreme Court, October term, 1910; brief for the United States, p. 245.

[5] Ibid., p. 240.

Coal & Iron Co. with lists of anthracite shipments made by its independent competitors, showing names of shippers and consignees.[1]

Section 18. Secret commissions.

The widespread practice of giving commissions and making gifts to persons who make purchases for others, including domestic servants, buyers for department stores, purchasing agents for railroads, and others, has been complained of as unfair competition.

In a comparatively recent case brought under the Sherman Act, the Government alleged, among other things, that the Cleveland Stone Co. "is accustomed by a money consideration or by conferring favors in different ways to influence architects who prepare plans and specifications for contemplated buildings, and induce said architects to specify stone quarried by the Cleveland Stone Co. and which has some particular trade name, thus excluding competitors from bidding thereon, though its competitors may have quarries located in the same stratum of stone and producing stone of precisely the same quality as that specified."[2]

The practice of giving "premiums" or commissions to salesmen of wholesale dealers, and so inducing them to push one manufacturer's goods at the expense of others, is said to be condemned as an "unfair practice" by salesmen who have profited by such premiums, even while they deny any element of underhandedness on their own part.[3]

Section 19. Misrepresenting competitors.

This may take the form of misrepresenting the competitor's goods, or his character, responsibility, or business methods. Complaint of such methods has in past times been made by persons in the harvesting-machine business.[4] Mail-order lumber houses have complained that the members of retail lumber dealers' associations, in their efforts to drive the mail-order houses out of business, have made systematic use of misrepresentation.[5]

The American Press Association, furnishing small newspapers with far the greater part of their plate matter, carried on for some time a vigorous competitive campaign against the Western Newspaper Union. The following complaint of its methods is from the

[1] United States *v.* Reading Co. et al.; in the District Court of the United States, Eastern District of Pennsylvania; Brief for the United States (May, 1914), pp. 61, 62.

[2] United States *v.* The Cleveland Stone Co. et al., 1913. In the District Court of the United States for the Northern District of Ohio. Petition in equity, p. 17.

[3] Interstate Trade: Hearings before the Committee on Interstate Commerce, United States Senate, 63d Cong., 2d sess., on Bills Relating to Trust Legislation, pp. 177, 178.

[4] Report of the Commissioner of Corporations on the International Harvester Co., pp. 36, 323–325.

[5] Trust Legislation: Hearings before the Committee on the Judiciary, House of Representatives, 63d Cong., 2d sess., on Trust Legislation, p. 1765.

petition in a Government suit under the Sherman Act, in which a decree against the defendants was rendered with their consent.

It has for many years published as a house organ a weekly paper called the American Press. This paper it circulates among all the country newspapers in the States and Territories. From the date of the Newspaper Union's refusal to sell its plate business to the association it has prosecuted, through this organ and by correspondence, a campaign of abuse and misrepresentation as to the Union's business and business methods for the purpose of taking from it its customers.[1]

In December, 1914, the Supreme Court of North Carolina had before it an indictment of six persons, claiming to be employed by the Wrought-Iron Range Co., for conspiracy to break up a competitor's business. It was alleged that the conspiracy was to be carried out by the following means:

To break up the sales made by the agents of the rival company; to abuse that company; to vilify it; to follow up its agents from town to town, from road to road, from house to house, and vilify and abuse them; to slander, vilify, and run down that company; to charge falsely that such rival company was composed of a set of thieves and liars; and to say falsely that the agents of that company were a set of thieves and liars, who were trying to cheat and defraud the people.[2]

Attention was called to a special method of competition in a letter on pending trust legislation, addressed to the chairman of the Senate Committee on Interstate Commerce by S. A. Taylor, of Pittsburgh, in February, 1914. Mr. Taylor was opposing any limitation on the right of a concern, in selling its goods, to choose its customers. In that connection he said:

The greatest reason which appears to me, however, is that a competitor might compel another to sell him a portion of his production, and in order to break down a fair competition would sell this portion of his production at a greatly reduced price, assuming to begin with that he would lose money on this portion of his purchase by doing it, so as to cripple and give the production of his competitor a bad name. This has been done in the past, and I can see where this clause might render it legal for him to do such things.[3]

Section 20. Abuses in advertising.

Complaints under this head relate to two different practices—deceptive advertising and excessive advertising. Deceptive advertising is not different in principle from other kinds of misrepresentation or cheating. "Overadvertising," however, has been condemned also as one of "the acts which wicked ingenuity has devised * * * to drive others out of business and exclude them from the free right to

[1] United States *v.* Western Newspaper Union et al.; petition, quoted in Trust Legislation: Hearings before the Committee on the Judiciary, House of Representatives, 63d Cong., 2d sess., on Trust Legislation, p. 1666.

[2] State *v.* Dalton et al., 83 S. E., 693, 695.

[3] Interstate Trade: Hearings before the Committee on Interstate Commerce, United States Senate, 63d Cong., 2d sess., on Bills Relating to Trust Legislation, p. 1070.

trade."[1] The point is that advertising takes money, and that extraordinary financial resources give an advantage which has no relation to any superiority of products or service, and which is, therefore, felt to be injurious to the public, and so unfair. As Prof. Taussig says:

It is not easy to say just how far advertising serves a good purpose, how far it means waste. No doubt it does stimulate wants, introduces new devices, promotes variety in production and consumption, and it is often a means of useful competition. But sometimes it is a weapon of destructive competition. Among articles equally good, that which is systematically paraded is likely to be most readily sold. * * * One might suppose that if Smith's wares were equally good and were sold at a lower price (made possible by eliminating the advertising expense) he would hold his own in spite of Jones's preposterous puffing. But, in fact, Jones's wares are preferred; some vague impression of superiority is produced by the incessant boasting. Plentiful cash is the sine qua non of an effective advertising campaign. The large producer, or would-be monopolist, has here again a tactical advantage.[2]

Section 21. Passing off goods for those of another.

This signifies any method tending to confuse one person's product with another's, so that a customer buys, or may buy, under a mistake as to whose goods he is getting. No other practice, perhaps, has been so often called unfair competition in the law of English-speaking peoples. Edward S. Rogers, of Chicago, says:

At an early day judges with consciences and a proper sense of sportsmanship began to decide cases in favor of the complainant which were in no sense trade-mark cases, but where the defendant's conduct involved precisely the same wrong—the sale of one trader's goods as those of another—the result being accomplished by some ingenious contrivance, the deceptive use of personal, geographical, or descriptive names, imitated labels or form of package, or in some of the infinity of ways which enable one trader to represent his goods as those of a competitor, whose reputation is better and whose trade he covets. The digesters and text-writers at first were puzzled to known where to classify such cases. The author of a textbook on trade-marks would devote a chapter to "Cases analogous to trade-marks," and put them there. Finally, the term "unfair competition" was adopted (perhaps from the French concurrence déloyale) and has since been used to describe that class of wrongs where by artifice one trader's goods are sold as and for another's. Probably the phrase "passing off," commonly used in England, more correctly describes the wrong as we now understand it in this country than "unfair competition," but "unfair competition" is the preferable designation if it can be given the meaning that, as a part of the English language, it ought to have—that it includes not alone "passing off" but any conduct on the part of one trader which tends unnecessarily to injure another in his business.[3]

[1] Interstate Trade: Hearings before the Committee on Interstate Commerce, United States Senate, 63d Cong., 2d sess., on Bills Relating to Trust Legislation, p. 1108.

[2] F. W. Taussig, Principles of Economics (1913), p. 428.

[3] Trust Legislation: Hearings before the Committee on the Judiciary, House of Representatives, 63d Cong., 2d sess., on Trust Legislation, pp. 1600, 1601.

Section 22. Shutting off competitors' credit.

This may take many forms. Pressure may be exerted on banks and capitalists to refuse loans. A representative of a farmers' cooperative organization complained that a cooperative warehouse at Memphis, storing cotton and making advances on it, had been subjected to a financial boycott of this kind.[1] An attempt may be made to throw a rival company into a receivership, or insinuations injurious to credit may be made. A mail-order lumber company complained that it had been attacked with such insinuations by the retail lumber dealers' associations.[2]

Section 23. Shutting off materials, supplies, or machines from competitors.

The complaints under this head presuppose something in the nature of a monopoly; without this the alleged injury could not be inflicted. It may be a legal monopoly, as one based upon patents or on the ownership of practically the whole supply of a natural resource, or it may rest on a practical monopoly of an industry without such a definite legal guaranty. In the suit of the United States against the American Can Co., brought in 1913, it was made a ground of complaint that that company had acquired most of the valuable patents for can-making machinery in order "to prevent the remaining competing can manufacturers and persons who might wish to become competing can manufacturers from obtaining the necessary machinery."[3] The Government based its suit against the Aluminum Co. of America partly on the allegation that the company was endeavoring to obtain control of the bauxite properties of the United States (bauxite being the earth or ore from which aluminum is made) in order to prevent anyone but itself from producing the metal aluminum.

An example of monopoly without specific legal warrant is the control which the American Tobacco Co. obtained over the production of licorice, and the embarrassment into which it was thus enabled to bring independent manufacturers of tobacco to whom licorice was a necessary material. The Government made it one of its grounds of complaint against the American Tobacco Co. that a subsidiary, the MacAndrews & Forbes Co., "obtained a practical monopoly of domestic and foreign commerce in licorice root and its products, and all substantial competition has been destroyed. One former com-

[1] Control of Corporations, Persons, and Firms Engaged in Interstate Commerce: Report of the Committee on Interstate Commerce, United States Senate, 62d Cong., pursuant to S. Res. 98, p. 2341; statement of T. J. Brooks, representing the Farmers' Educational Cooperative Union, Atwood, Tenn.

[2] Trust Legislation: Hearings before the Committee on the Judiciary, House of Representatives, 63d Cong., 2d sess., on Trust Legislation, p. 1770.

[3] United States *v.* American Can Co. et al., original petition, filed Nov. 29, 1913, in the District Court of the United States, District of Maryland, p. 12.

petitor * * * remains, but he depends on the combination for raw materials and exists by sufferance."[1]

The method complained of in the last-named case was not complete denial of supplies to independent manufacturers, but exorbitant prices.[2]

Section 24. Acquiring stock in competing companies for purpose of reducing or destroying competition.

A large company sometimes obtains an interest in a competitor without obtaining control, and uses its interest to destroy or injure it. Persons interested in the United States Pipe Line Co., which had been formed by the independent refiners and crude-oil producers to transport both crude and refined oil, complained that the Standard Oil Co. obtained an interest in it with such ends in view.

The United States Pipe Line Co. excluded the Standard from its meetings on ground that the Standard acquired its stock to compass its destruction and to get information that would lead to the destruction of the independent movement.[3]

Section 25. Wrongful and malicious suits.

It is often not easy to determine how far suits are malicious and how far they are merely proper efforts to maintain supposed rights. There is in most cases, of course, ground of suit. Often it is an alleged infringement of patent. Among the "unfair means" by which the National Cash Register Co. was accused of restraining trade in the indictment brought against its officers in 1912 was this: That it brought suits against competitors and against purchasers of their machines, alleging infringement of patent rights, when it knew that no patents existed by which such suits could be sustained.[4]

Baseless and vexatious patent suits were one of the means which the Standard Oil Co. was accused of using to compass the destruction of the Buffalo Lubricating Oil Co.[5]

Section 26. Intimidation.

While threats are often a separate basis of complaint, they are in general only subsidiary to actual injuries. Threats are apt to be effective only as the power and the disposition to injure are actually manifested.

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[1] United States *v.* American Tobacco Co. and others; in the Supreme Court, October term, 1910; brief for the United States, p. 301.

[2] Report of the Commissioner of Corporations on the Tobacco Industry, Pt. I, p. 24.

[3] Industrial Commission, Preliminary Report on Trusts and Industrial Combinations (vol. 1 of the Commission's reports); testimony of Thomas W. Phillips, p. 590.

[4] United States *v.* Patterson and others (201 Fed., 703).

[5] House Reports, 50th Cong., 1st sess., vol. 9, Report No. 3112, Standard Oil Trust hearings; pp. 432, 434.

In United States *v.* Western Newspaper Union, American Press Association, et al., the petition accused the defendants of "numerous acts of unfair competition," which included "summoning * * * competitors to conferences and openly telling them they could not continue in their competing business, but that they must either get out or sell out, and coupling such demands with threats of still fiercer unfair competition, including the installation of competitive plants in their territory, and a recitation of plants already bought out or put out, and of the cooperation between all the defendants in the campaign against them."[1]

Threats are often made to customers of competitors as well as to the competitors themselves. The petition just quoted furnishes an instance. It gives the following accusation against some of the defendants:

> They have threatened papers located at points that can not support two small newspapers to start competing papers unless they patronized defendants.[2]

Section 27. Fixing channels of trade.

Retailers feel themselves aggrieved if wholesalers sell to consumers, and often endeavor to stop it. In many towns, it is said, wholesale grocers understand that they will be boycotted if the retailers catch them selling to consumers. The retailers feel that they are only taking proper action to restrain competition which they regard as unfair. The associations of retail lumber dealers have been very active in enforcing the same view. "We do not consider it fair," said the secretary of the New Jersey Lumbermen's Protective Association, in a letter dated February 8, 1904, "for a man who is engaged in manufacturing or wholesaling lumber, competing with his own customers." The annual report of the board of directors of this association, submitted February 26, 1907, contained the following passage: "It is wrong in principle for the wholesaler or the manufacturer, as we have always contended, to become active competitors of their own customers, the retailers."[3] Manufacturing consumers of lumber who constantly buy in lots of a carload or more are usually able to buy from manufacturers and wholesalers without open objection from the retailers; but occasionally the retailers have been strong enough to shut out even very large consumers of this class. Against building contractors they have especially contended; even against contractors who have had lumber yards. In many cases the retailers' associations have been able to enforce upon wholesalers and manufacturers their contention that a man who makes a business of build-

[1] Quoted in Trust Legislation: Hearings before the Committee on the Judiciary, House of Representatives, 63d Cong., 2d sess., on Trust Legislation; pp. 1664, 1665.

[2] Ibid., p. 1665.

[3] U. S. *v.* Eastern States Retail Lumber Dealers' Association et al., Record, Vol. IV, petitioner's exhibits, p. 293.

ing, even though he also makes a business of retailing lumber, is not a "regular" or "legitimate" retailer. For selling to such retailers many manufacturers and wholesalers have been boycotted.

On the other hand, a great body of opinion holds that all such discriminations are unfair and should be prohibited. Says Samuel Untermeyer:

> I think that, broadly speaking, a man who is in interstate commerce ought to be obliged to sell to anybody who is responsible. * * * A man should not arbitrarily refuse, without cause, to sell a given customer. * * * You need never extend credit to a man, but the man who comes with the money should be allowed to purchase.[1]

The same idea is implied in the proposition that goods should be sold at a fixed and published price, uniform to all comers.[2]

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[1] Trust Legislation: Hearings before the Committee on the Judiciary, House of Representatives, 63d Cong., 2d sess., on Trust Legislation, p. 849.

[2] P. 316, above.

CHAPTER VII.

UNFAIR COMPETITION AT THE COMMON LAW.

Section 1. Introductory.

The purpose of this chapter is to present certain phases of the common law relating particularly to the right of persons engaged in business to be protected from unfair or oppressive methods of competition, without assuming to determine whether or not such methods are unfair within the meaning of section 5 of the Federal Trade Commission act.

Every person has a right to engage in business and to strive by all lawful means to advance his own interests, and if, as the result of a mere exercise of this right, others conducting similar enterprises lose custom, they have no cause of action for such injury. The right to lawfully compete in business affords a justification and negatives any claim that the injury was inflicted wantonly or without cause. The right to compete is not absolute, however, but is qualified by the existence of a similar right in others.

Generally speaking, persons engaged in business occupy much the same relation to each other as other members of society. Business rivalry ordinarily confers no privilege to commit acts or to engage in practices which would be unlawful if indulged in by persons in other walks of life. The fact, for instance, that two men are business competitors will not justify one in making libelous statements concerning the other, in physically obstructing the passage of his agents along the public highways, or in bribing them to act contrary to his interests. Whether or not the object of such an attack is a competitor, conduct of this character is equally unlawful. But acts which would ordinarily not result in actual damage may sometimes seriously injure a business rival. To illustrate, a false statement that a farmer uses a low-grade fertilizer could not conceivably cause him injury, whereas a similar statement made by one engaged in the manufacture of fertilizer respecting the product of a competing manufacturer, if generally believed, would probably result in a loss of sales by the competitor and consequent financial injury for which damages could be recovered.

On the other hand, the fact that the parties are competitors has been held, in some cases, to constitute a justification for acts which have resulted in damage, although, under other circumstances, they

might possibly have been considered actionable as a wanton and malicious interference with another's business. Thus, though the decisions are not in accord, it has been held that a business man knowing that a competitor has a contract to sell goods to another may procure the latter to violate the contract and purchase his goods instead and that such conduct should be permitted in the interest of free competition, although in the absence of competition it might be actionable. This chapter has, therefore, been largely confined to a consideration of cases arising between business rivals; in other words, to cases in which the justification of competition might have been considered by the courts. Only where there was not a sufficient number of decisions of this description to show the true state of the law has resort been had to cases in which the element of competition was not present.

There are also certain forms of property, such as secret formulas, lists of customers, and other trade secrets, as well as the good will of a business, or the property in particular brands or trade names, which are peculiarly the product of business activity. Attempts by competitors to discover such secrets by the corruption of employees or by other methods, or unfairly to appropriate the benefits resulting from the established reputation of a rival's products by palming off, as his goods, articles manufactured by others, have given rise to many legal controversies. The decisions in these cases constitute a distinct body of the law, dealing wholly with trade competition.

While the primary question to be determined in the cases presented here is the legality of the acts or conduct complained of, there is involved in many cases an element of unfairness, of breach of trust, of willful misrepresentation, of flagrant dishonesty, or of coercion or oppression. This fact appears to have led the courts to characterize certain acts as unfair competition. The use of marks or wrappings to deceive purchasers and pass off one man's goods as those of another has for years in this country been termed unfair competition. Other practices, such as procuring the breach of a competitor's contracts, betraying, or inducing others to betray, a competitor's trade secrets, or intimidating a competitor's customers by threats of infringement suits, have also been characterized by the courts as unfair competition. These and many other acts or practices have been frequently described or alluded to by the courts in other terms of much the same significance, such as "inequitable competition," "unfair conduct," "unfair dealing," "unfair means," "unfair business methods," "unfair advantage," "unfair mode of trading," or as "unfair and unjust practices and methods." Such expressions also as not "fair competition," not "proper competition," not "honest competition," not "legitimate

competition," not "lawful competition," not "legitimate and lawful competitive methods" are frequently employed by the courts to describe competitive acts or practices which are regarded as unlawful. The inherently unfair or fraudulent character of some of the practices considered in this chapter is unquestionably an element in determining their illegality.

Except where made criminal by statute, probably few single acts of unfair competition could be made the subject of a proceeding in the name of the State. The cases considered in this chapter are, therefore, almost wholly such as have arisen between private parties, and consequently little attention has been paid by the courts to the public consequences of the use of the practices or methods involved. Only where the cases involved a restraint of trade, or some form of fraud on the public, has the policy of preventing unfair competitive methods because of their effect on the public been considered. That the use of competitive acts or practices considered in this chapter, and held to be unlawful at the common law as between private parties, may, however, tend to restrain trade or create a monopoly appears from the fact that many of them have been employed by corporations occupying monopolistic positions in particular lines of business, or by associations of traders, and their use has been enjoined in suits instituted by the Government under the Sherman Antitrust Act.[1]

Common-law decisions respecting the legality of certain competitive methods are considered in the following order: (*a*) Inducing breach of competitors' contracts; (*b*) enticing employees from the service of competitors; (*c*) betrayal of trade secrets; (*d*) betrayal of confidential information; (*e*) appropriation of values created by competitors' expenditures; (*f*) defamation of competitors and disparagement of competitors' goods; (*g*) misrepresentation by means other than words; (*h*) false claims to testimonials; (*i*) intimidation of competitors' customers by threats of infringement suits; (*j*) combinations to cut off competitors' supplies or to destroy their market; (*k*) intimidation, obstruction, and molestation of competitors or their customers; (*l*) preventing the sale of competing goods by demanding contracts for exclusive dealing; (*m*) bribery of employees; (*n*) competing with purchaser after the sale of business and good will; (*o*) passing off the goods of one manufacturer or dealer as those of another.

There are some ingenious competitive devices or practices that have been apparently little used and have been before the courts only in isolated cases. Cases of this character are collected at the end of the chapter under the title "Miscellaneous."

[1] See Ch. VIII.

Decisions not only by the courts in the United States but in England and in other countries which have the English common law have been included in this chapter. It has appeared desirable, however, to present the American and foreign decisions separately.

Section 2. Inducing breach of competitors' contracts.

It has been a common practice for manufacturers or dealers, public-service corporations and others, to induce persons under contract to purchase supplies, goods, or service from their competitors, to break such contracts and purchase from them instead. As a result of this practice a number of cases have arisen both in the Federal and State courts where the injured party has sought to recover damages from the competitor procuring the violation of its contractual rights, or to prevent such competitor from continuing this method of competition. In the course of opinions in this class of cases the courts have referred to the practice of procuring the breach of competitors' contracts as "unfair competition," have stated that it was not within the domain of "fair competition," or have characterized it in similar terms. Thus, a Federal district court has stated that the "right to compete in business does not justify 'unfair' competition in business or trade, or misrepresentations which tend to induce one party to a legal contract to refuse to perform it to the damage of the other party";[1] and in another case where damages were sought for fraudulently preventing a competitor from securing a contract the Federal circuit court of appeals said that "it will hardly be contended that the means charged to accomplish the wrong, prompted by the motive charged, brings the conduct of the defendants within the domain of fair competition for trade."[2] In an earlier case the Federal circuit court, referring to an offer to indemnify a competitor's customers who violated their contracts, stated that such conduct "transcends the rights of the law of competition."[3] The Supreme Court of New York referred to inducing a breach of competitors' contracts as a step "in the same scheme of unfair competition,"[4] and the Supreme Court of Oklahoma, in the course of an opinion which involved inducing a violation of another's contracts, said that "unfair competition is, and always has been, frowned upon by the law, and the trend of decisions from Lumley *v.* Gye[5] to the present time seems to sustain the proposition that it is a violation of legal right to interfere with contractual relations recognized by law if

[1] Sperry & Hutchinson Co. *v.* Pommer, 199 Fed., 309, 314 (D. C., 1912).
[2] Lewis *v.* Bloede et al., 202 Fed., 7, 24 (C. C. A., 1912).
[3] Citizens' Light, Heat & Power Co. *v.* Montgomery Light & Water Power Co., 171 Fed., 553 (C. C., 1909).
[4] American Law Book Co. *v.* Edward Thompson Co., 84 N. Y. Supp., 225 (1903).
[5] 2 El. & Bl., 216 (1853).

there be no sufficient justification for the interference."[1] The Supreme Judicial Court of Massachusetts, in a recent case, said: "It is manifest that to knowingly and maliciously induce another to break a contract * * * is not justified by fair trade competition;"[2] and the Supreme Court of Michigan in 1914 expressed the opinion that "there are many ways, other than by interference with contract, of harassing, interfering with, and obstructing a competitor in such a manner as to amount to unfair competition, in the broadest sense of the term."[3]

AMERICAN DECISIONS.

The cases in this country involving the lawfulness of inducing or procuring a breach of contract may be divided into two broad classes, namely:

1. Those in which the breach is procured by the use of fraud, by false statements respecting the other party to the contract or his goods, by coercing or intimidating one of the parties to abandon the contract, or by the employment of other unlawful means.

2. Those in which no unlawful means are employed but where the violation of contractual rights is induced by mere persuasion or argument, or by the offer of lower prices, superior goods, or other similar means.

INDUCING BREACH BY FRAUD, COERCION, INTIMIDATION, OR OTHER UNLAWFUL MEANS.—It is very generally held by Federal and State courts that it is unlawful and gives rise to a cause of action for damages, to induce one of the parties to a contract not to perform it, if fraud, coercion, intimidation, molestation, or other unlawful means be employed to procure this action on the part of the contracting party. Thus it was held by the Supreme Court of the United States that one who had a contract to construct a railroad could recover damages from a competing line which, by bribing officials of the road under construction and by false representations, induced the State legislature to revoke a grant of land to the road, thus making it impossible to continue the construction of the line and depriving the contractor of the benefit of his contract.[4] And where merchants purchased trading stamps from a company and agreed not to use the stamps of any other company, the Federal district court held it unlawful for a competing company to procure the merchants by false representations to break their contracts; and enjoined the rival company from further soliciting or inducing merchants, "by any illegal

[1] Schonwald et al. *v.* Ragains, 122 Pac., 203 (Okla. Sup. Ct., 1912).
[2] Wheeler-Stenzel Co. *v.* American Window Glass Co. et al., 202 Mass., 471 (1909).
[3] Attorney General *v.* National Cash Register Co., 148 N. W., 420, 428 (Mich. Sup. Ct., 1914).
[4] Angle *v.* Chicago, St. Paul, etc., Ry., 151 U. S., 1 (1894).

means or methods," to violate their agreements.[1] The same principle was applied in another case where a Federal court held it to be unlawful for the unsuccessful bidder for a contract to prevent by fraud and collusion the consummation of a contract with another whose bid had been accepted.[2]

Similarly, the Supreme Court of New York held that it was unlawful and ground for an injunction for a publishing house intentionally to make false statements regarding the relative merits of its own and a rival publisher's works for the purpose of inducing the latter's subscribers to break their contracts and purchase the books of the former; and to agree to indemnify the subscribers so violating their contracts in the event of suit.[3] In an earlier case it was held that a party who had contracted to sell hogs to another at a future date could recover damages from a third party, who, learning of the contract, falsely represented to the intending purchaser that the hogs would not be delivered as agreed and thus induced him to buy his own hogs instead.[4] Similarly, where the plaintiff had contracted to purchase cheese from another, and the defendant, a competitor, with knowledge of the contract, induced the owner to sell the cheese to him, it was held that the plaintiff could recover damages.[5]

A similar ruling was recently made by the Maryland Court of Appeals. It appears that an ice-making company threatened to discontinue selling a wholesale company whom it was under contract to supply, unless the latter would break its contract to deliver large quantities of ice to a local dairy company, the manufacturer being desirous of securing the patronage of the dairy company. Fearing that it would be unable to purchase ice elsewhere, the wholesaler yielded, but later sued the manufacturer for compelling it to give up its contract with the dairy company, and it was held that damages could be recovered.[6] In Schonwald et al. *v.* Ragains[7] the Oklahoma Supreme Court held it unlawful for the members of an association of ice

[1] Sperry & Hutchinson Co. *v.* Pommer, 199 Fed., 309 (D. C., 1912).

[2] Lewis *v.* Bloede, 202 Fed., 7 (C. C. A., 1912).

[3] American Law Book Co. v. Edward Thompson Co., 84 N. Y. Supp., 225 (1903).

[4] Benton *v.* Pratt, 2 Wend., 385 (N. Y., 1829).

[5] Rice *v.* Manley, 66 N. Y., 82 (1876).

[6] Sumwalt Ice Co. *v.* Knickerbocker Ice Co., 80 Atl., 48 (Md. Ct. of App., 1911). Per Burke, J.: "The plaintiff had the right to carry on its business under the contract with the Gardiner Dairy Company and it was the legal duty of the defendant to refrain from the use of intimidation, force, coercion, threats, or any other illegal means with a view of preventing it from doing so, and, if with the purpose and by the means stated in the declaration defendant prevented the plaintiff from fulfilling its contract with the Dairy Company and thereby the plaintiff was damaged as alleged, the defendant's liability for such damage or loss can not be seriously doubted. The gist of the action is the wrongful and unlawful interference with the business relations of the plaintiff by the means and for the object alleged."

[7] 122 Pac., 203, 210 (Okla. Sup. Ct., 1912). See also Standard Oil Co. *v.* State, post p. 160; Standard Oil Co. *v.* Doyle, 622, p. 459.

dealers to procure the patrons of a competing outside dealer to break their contracts for ice, by refusing to sell them unless they disregarded these contracts, and by threatening that when the competing dealer's supply of ice was exhausted the members of the association would not sell to anyone who had purchased from him.[1] And where an association of laundrymen, for the purpose of compelling a competing laundry agent to maintain their scale of prices, procured other laundries, by offers of money or by threats to ruin their business, to refuse to perform their contracts to do work for the said laundry agent, it was held that the latter was entitled to damages and that the right of competition in trade was not a justification for such acts.[2]

In a number of other cases, both Federal and State, it has been held unlawful to induce a breach of contractual obligations by fraudulent or other unlawful means. In a majority of these cases, however, the parties to the controversy were not competitors and the question whether competition was a justification for the acts was not therefore passed upon.[3]

INDUCING BREACH OF CONTRACT BY LAWFUL MEANS.—As stated above, it is generally regarded as unlawful to induce or procure one of the parties to a contract to refuse to perform it if any unlawful means be employed to effect this end. A more difficult question, and one

[1] In this case the court, per Robertson, Commissioner, said in part: "* * * In the instant case had the conduct of Schonwald and the ice company been directed and governed solely by the desire to legitimately eliminate Ragains' retail ice business by fair competition no action could have been maintained against them, but it is plainly evident that they were not so limited, directed, or actuated. The threats, coercions, and intimidating statements made by them to the customers of Ragains had for their sole and primary object, not the building up of their own legitimate business, but the destruction of Ragains' business, and that, too, by the most unreasonable, unfair, coercive, and unjustifiable methods. The only legitimate result of their conduct, as is plainly shown by the testimony, from the commencement of the troubles between them was to injure unfairly, and without sufficient excuse or justification, the business of Ragains. They did not sell their ice cheaper. They did not claim to have a better grade or quality of ice. They did not offer better delivery facilities. They did not offer any inducement by way of credits or time in payment of accounts. They did not show by any legitimate or reasonable or justifiable method that the customers by patronizing them would obtain better results or better service than Ragains could furnish, and their sole and only excuse was that they enjoyed a monopoly of the ice business in Blackwell and vicinity, and thereby controlled the ice market, and that unless the customers who had contracts with Ragains would forthwith break and violate those contracts they could not have or purchase any ice from said defendants in case Ragains' ice supply for any reason should become exhausted; and they further informed said customers that Ragains could not, in the event of his supply becoming exhausted, purchase ice from any other person who supplied said city with ice on account of combinations and understandings had by said defendants with other ice companies, the benefits of which said combinations were denied Ragains, and that, therefore, the said customers would be unable to procure any ice at all. There was no possible excuse or justification for such conduct. The actions of defendants without doubt were malicious and unwarranted."

[2] Doremus *v.* Hennessy, 176 Ill., 608 (1898).

[3] Bitterman *v.* Louisville & Nashville R. R. Co., 207 U. S., 205 (1907); Delaware, Lackawanna & Western Ry. Co. *v.* Frank et al., 110 Fed., 689 (C. C., 1901); Kinner et al. *v.* Lake Shore & Mich. So. Ry., 13–23 Ohio C. C. Dec., 294 (1902); American Malting Co. *v.* Keitel, 209 Fed., 351 (C. C. A., 1913); Krigbaum *v.* Sbarbaro et al., 138 Pac., 364 (Cal. Dist. Ct. of App., 1913); Perkins *v.* Pendleton et al., 90 Me., 166 (1897); Morgan *v.* Andrews, 64 N. W., 869 (Mich. Sup. Ct., 1895); London Guarantee Co. *v.* Horn, 206 Ill., 493 (1904).

on which the American courts are divided, is whether it is unlawful for a manufacturer or dealer to procure his competitors' customers to violate contracts already entered into where this is accomplished not by the use of unlawful means, such as misrepresentation, fraud, or coercion, but merely by persuasion, by the offer of lower prices, or by similar inducements. Some of the courts, both Federal and State, hold that it is unlawful actively and knowingly to procure a breach of contract, although only lawful means be employed. These courts announce the doctrine that the parties to a valid contract have a legal right to have it performed, and that whoever deliberately interferes and by persuasion, solicitation, or the offer of lower prices, or by any other means, procures one of the parties to abandon the contract, is liable in damages to the injured party. On the other hand, some of the courts hold that inducing a breach of contract by mere persuasion, or by the offer of better prices, is not actionable. Some of these decisions rest upon the ground that solicitation or offering inducements of a lawful nature must be protected in the interest of freedom of competition and that the injured party to the contract should be left to his remedy against the other contracting party.

Procuring breach by lawful means actionable.—In a comparatively recent case in the Federal circuit court it was held that schoolbook publishers were liable in damages to a rival publisher for inducing county schoolbook boards to adopt their books in lieu of those of their competitor where the latter had contracts to supply the books for a term of five years.[1] And where a trading-stamp company induced merchants who had contracted to use only the stamps of a competing company, to violate their contracts and to adopt its stamps instead, the Federal district court issued a preliminary injunction restraining the company from interfering with its competitor's subscribers and from soliciting and inducing them to break their contracts.[2] Recent opinions of the highest courts of several States are in accord with these Federal decisions. For example, the Maryland court of appeals held in a recent case that a dealer who had a contract to supply a distilling company with 2,000 gross of bottles could recover damages from a competitor who, with knowledge of the contract, induced the distilling company to cancel the contract by the

[1] Heath et al. *v.* American Book Co., 97 Fed., 533, 536 (C. C., 1899). Per Jackson, J.: "In this case we think it cannot be denied that the damage complained of was the result of the defendant's act in submitting its book to the schoolbook boards, and urging them to adopt it in lieu of the plaintiffs' books, which resulted in supplanting the plaintiffs' books by the schoolbook boards and their use dispensed with in the schools, and that, when the contract was entered into between the schoolbook boards and the defendant, such was contemplated by both parties to it."

[2] Sperry & Hutchinson Co. *v.* Associated Merchants' Stamp Co., 208 Fed., 205 (D. C., 1913).

offer of lower prices.[1] Similarly where a hotel corporation appointed an exclusive booking agent for certain territory and subsequently was induced to give the same privilege to another, it was held that the latter could be enjoined from acting as the agent of the corporation within the specified territory and from seeking to prevent the agent first appointed from acting as the exclusive agent for that territory.[2] The same court in a subsequent case held it unlawful for a manufacturer to induce an association of jobbers, organized for the collective buying of window glass, to refuse to perform its contract with a member to supply it with a specified amount of glass per year.[3]

The same principle was applied in Knickerbocker Ice Co. *v.* The Gardiner Dairy Co.[4] There the dairy company had a contract with a retail ice company by which the latter was to supply it with ice not to exceed a specified quantity at a given price. The Knickerbocker Co., manufacturers of ice, desired the business of the dairy company for itself and threatened not to sell the retail company any more ice unless it abandoned its contract to supply the dairy company. Being compelled by existing market conditions to purchase ice from the Knickerbocker Co., the retail company yielded to the former's demands and declined to perform its contract with the dairy company. The latter sued the Knickerbocker Co. for inducing a breach of the contract, and the Maryland Court of Appeals held that it could recover.

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[1] Cumberland Glass Mfg. Co. *v.* De Witt, 87 Atl., 927 (Md. Ct. of App., 1913). In this case the defendant particularly urged that trade competition was a sufficient justification for procuring a manufacturer to cancel a contract with his competitor and to transfer the order to the defendant, but the court held the contrary, saying in part, by Burke, J.: "Now, what is the justification upon which the defendant relies to exonerate itself from responsibility? It is the right of competition in trade. It asserts this proposition: That the right of competition justifies a defendant in knowingly and deliberately, for its own benefit or advantage, inducing the breach of a contract by offering lower prices. No case has been cited to support this contention. Counsel for appellant have cited a number of cases bearing upon the right of competition in trade or business. But this is altogether different from the right which one has to be protected from interference with his rights under existing contracts * * *. We, therefore, hold that the right to compete furnishes no justification to the defendant in this case."

[2] Beekman *v.* Marsters, 80 N. E., 817 (Mass. Sup. Ct., 1907). Per Loring, J.: "The result of the findings of the master must be taken to be that the defendant induced the hotel corporation to break its contract with the plaintiff, but that he did not do this to spite the plaintiff or for the purpose of injuring him, but for the purpose of getting for himself (the defendant) business which the plaintiff alone was entitled to under the contract with the hotel corporation, that is to say, to get business which the defendant could not get if the hotel corporation kept its agreement with the plaintiff * * *. No case has been cited which holds that the right to compete justifies a defendant in intentionally inducing a third person to take away from the plaintiff his contractual rights."

[3] Wheeler-Stenzel Co. *v.* American Window Glass Co., 202 Mass., 471 (1909). Per Morton, J.: "It is manifest that to knowingly and maliciously induce another to break a contract with the plaintiff is not justified by fair trade competition." See also Dr. Miles Medical Co. *v.* Platt, 142 Fed., 606 (C. C., 1906); Wells & Richardson Co. *v.* Abraham et al., 146 Fed., 190 (C. C., 1906); Tubular Rivet & Stud Co. *v.* Exeter Boot & Shoe Co., 159 Fed., 824 (C. C. A., 1908); Filler *v.* Joseph Schlitz Brewing Co., 223 Fed., 313 (C. C. A., 1915); Illinois Steel Co. *v.* Brenshall, 141 Ill. App., 36 (1908).

[4] 69 Atl., 405 (Md. Ct. of App., 1908).

There are other decisions of State courts holding it to be unlawful to procure a breach of a valid contract regardless of whether the means employed be in themselves unlawful, but in most instances the parties to the controversy were not competitors and trade competition was not, therefore, urged as a justification for the defendant's action in procuring a violation of contractual obligations;[1] though in cases involving the discharge of nonunion men at the instance of labor unions it has been unsuccessfully urged in justification of such action.[2]

Procuring breach by lawful means not actionable.—In contrast with the decisions above set out are opinions in both Federal and State courts holding that it is not actionable to procure a breach of a competitor's contracts with his customers if it be accomplished by mere solicitation, persuasion, or similar means. Thus in a well-considered Federal case, where a light and power company sought to induce the patrons of a rival company to cancel their contracts and offered to indemnify them in the event of suits being instituted by the competing company for breach of such contracts, it was held by the circuit court that if the object could be accomplished by solicitation or persuasion it was not unlawful, but that the company could not go so far as to offer to indemnify its competitor's customers against damages resulting from repudiating their contracts.[3] Similarly where the proprietor of a theater had engaged a dramatic star

[1] Raymond *v.* Yarrington et al., 73 S. W., 800 (Tex. Sup. Ct., 1903); Bowen v. Speer, 166 S. W., 1183 (Tex. Ct. of Civ. Apps., 1914); Faunce *v.* Searles, 142 N. W., 816 (Minn. Sup. Ct., 1913); Iron Molders' Union *v.* Allis-Chalmers Co., 166 Fed., 45 (C. C. A., 1908).

[2] Berry *v.* Donovan, 188 Mass., 353 (1905).

[3] Citizens' Light, Heat & Power Co. *v.* Montgomery Light & Water Power Co., 171 Fed., 553, 560 (C. C., 1909). Per Jones, J.: "The trader who has made a contract with another person has a right, which the law will protect, to have that other keep it. Other traders have a correlative right to solicit the custom to which the contract relates. Whatever damage results to the first trader by the mere solicitation is privileged, so far as the solicitor is concerned, in the interest of proper freedom of competition. Were the law otherwise, the first person occupying the field of public service in many localities, by procuring long contracts to take water, light, and the like from him, might intrench himself in a monopoly there for years, because another thereafter could not solicit customers, thus bound, to change their patronage to him, and thereby enable a rival enterprise to enter the field. The faithful observance of contracts, however, is as essential to the public welfare as the right of competition. Property rights, public and private morality, and liberty itself are insecure when the law encourages the nonobservance of contract obligations. Hence, while the law allows the trader by mere solicitation to persuade customers to change their business relations, it does not permit such a solicitor, even in the interest of competition, to go further, intervening actively between the contracting parties, as a dominant agency in producing a breach by promise of indemnity to one of them to induce the breach. When the solicitor knowingly and intentionally goes beyond mere solicitation to induce another man's customer to do business with him, and promises to hold that other man's customer harmless for breach of contract with him, he transcends the rights of the law of competition, has no 'sufficient justification,' and thereby becomes liable to him whose customer is taken over. Such conduct is an unlawful interference with another man's rights, for which he may maintain an action and recover nominal damages, although the contract be not actually breached in consequence of the solicitation."

to perform at his house the Supreme Court of Kentucky held that he could not recover damages from the owner of a rival house who induced her to cancel the contract and to perform at his theater instead, there being no evidence that any fraud, misrepresentation or other unlawful means had been employed to procure the breach of contract;[1] and the same court has held that a party who had contracted with a farmer for the purchase of the latter's crop of tobacco could not recover damages from another who persuaded the farmer to repudiate the contract and to sell the tobacco to him, it not appearing that any fraud or force had been employed.[2]

In addition to the cases already referred to, there are a number of others which affirm the doctrine that inducing a breach of contract is not actionable unless unlawful means be used to procure it.[3] And in a recent case the Federal circuit court held that where a person purchased property with knowledge that the owners had contracted to sell it to another he would not be liable in damages to the latter unless he had taken some active step to bring about the breach of contract of sale or had at least induced or persuaded the owner to abandon the earlier agreement to sell the property.[4]

ENGLISH DECISIONS.

It is apparently an established principle of English law that it is unlawful knowingly to induce the violation of a contract if it be valid and for a determinate period, the law on this subject having been reviewed and stated at length in several recent decisions of the House of Lords. Expressions are to be found in some of the decisions to the effect that procuring the breach of or abandonment of a contract might be justified on the ground that the person procuring it was under a duty to advise or persuade one of the contracting parties not to perform the contract, as if a parent or guardian should persuade a child or ward to abandon a contract to marry. But there appears to be little doubt that business competition or competi-

[1] Bourlier Bros. *v.* Macauley, 91 Ky., 135 (1891).

[2] Chambers et al. *v.* Baldwin, 91 Ky., 121 (1891). Per Lewis, J.: "But as Wise was not induced by either force or fraud to break the contract in question, it must be regarded as having been done of his own will and for his own benefit; and his voluntary and distinct act, not that of appellee, being the proximate cause of damage to appellants, they, according to a familiar and reasonable principle of law, cannot seek redress elsewhere than from him." See also Roseneau *v.* Empire Circuit Co., 131 N. Y. App. Div., 429 (1909), post, p. 416.

[3] Boyson *v.* Thorn, 33 Pac., 492 (Cal. Sup. Ct., 1893); Swain *v.* Johnson et al., 65 S. E., 619 (N. C. Sup. Ct., 1909); Jackson *v.* Morgan et al., 94 N. E., 102 (Ind. Appellate Ct., 1911); Ashley *v.* Dixon, 48 N. Y., 430 (1872); Glencoe Sand & Gravel Co. *v.* Hudson Bros., etc., 40 S. W., 93 (Mo. Sup. Ct., 1897); Tenn. Coal Co. *v.* Kelly, 163 Ala., 348 (1909); Sleeper *v.* Baker et al., 22 N. Dak., 386 (1911).

[4] Sweeney *v.* Smith et al., 167 Fed., 385 (C. C., 1909).

tion between union and nonunion labor is not a justification for procuring a breach of contract.[1]

In the first important English case on this subject other than cases involving the legality of enticing another's servant to leave his employ, it was held by the Court of Queen's Bench that the proprietor of a theater who had engaged an operatic star to sing at his house during a specified period and not to sing elsewhere during that time, could recover damages from the owner of a rival theater who had induced the singer to violate the contract and to sing at his theater within the period named in her original contract.[2] The same principle was applied by the court of appeal in 1881, when it held that one who had contracted with an artisan to manufacture bricks and tile exclusively for him by a secret process known only to the artisan, could recover damages from a third party who induced the workman to make bricks and tile for him in violation of his agreement.[3] Similarly, where the members of a labor union, in order to compel certain builders to comply with their demands, attempted to induce merchants not to sell them lumber or other supplies, and by refusing to work on supplies purchased from merchants who sold to the objectionable builders, compelled builders to break existing contracts for supplies with such merchants, it was held that the latter could recover damages from the members of the union who had thus deprived them of the benefits of their contracts.[4] So, also, where the members of a labor union, in an effort to compel an employer to discharge nonunion men, forced others under contract to purchase from him to repudiate the contracts by threats of ordering a strike in their places of business, and induced his employees to leave him in violation of their contracts of employment, it was held by the House of Lords that the employer could recover damages from the members of the union.[5] In this case it appeared that the employer had offered to pay all fines, debts, and demands of the union against his men, and asked to have them admitted to the union, but the union refusing to comply with the request, and persisting in its efforts to embarrass him, and to force his men out of employment, he brought the action, with the results above set forth. In a subsequent case it was held by the same tribunal that mine owners whose employees had been ordered by the miners' federation to stop work on certain days, in violation of their contracts, could recover damages from those thus procuring

[1] As the number of cases involving the legality of inducing a breach of contract other than a contract of employment is very limited, and as the English law on this subject is principally found in decisions of the House of Lords in labor cases, it has been necessary to use cases of this character in order to show the state of the English law.

[2] Lumley *v.* Gye, 2 El. & Bl., 216 (Q. B., 1853).

[3] Bowen *v.* Hall, L. R. (1881), 6 Q. B. Div., 333 (Ct. of Appeal).

[4] Temperton *v.* Russell et al., L. R. (1893), 1 Q. B., 715 (Ct. of Appeal).

[5] Quinn *v.* Leathem, L. R. (1901), A. C., 495.

a breach of the contracts existing between them and their employees, notwithstanding the fact that the action of the federation was not taken with any malice or ill will toward the mine owners, but with the object of keeping up the price of coal, by which the wages of the miners were regulated.[1] The doctrine of these cases appears to be followed in a subsequent decision of the court of appeal, which held that a mason's apprentice could recover damages from a society of laborers which had procured his employer, by threats of calling a strike, to refuse to continue him in his employ as an apprentice according to the terms of his apprenticeship contract.[2] In another case an injunction was granted restraining the defendants from inducing subscribers to quotations from the London Stock Exchange to violate their contracts not to sell or disclose the information to others.[3] And in a more recent case the same court decided that a company engaged in the sale of phonographs and records, which bound wholesale and retail dealers not to sell to anyone who was on its suspended list, could recover damages from a competing company which was on this list and which had procured machines from a dealer by having two of its employees falsely represent themselves as dealers and sign fictitious names to contracts presented to them. It was held, however, that where no misrepresentation was used, the competing company having secured machines from a dealer who merely assumed that it was not on the suspended list, damages could not be recovered.[4]

INDUCING BREACH ACTIONABLE THOUGH PROCURED BY LAWFUL MEANS.—The early English cases appear to hold that inducing a breach of contract was not actionable unless some unlawful means were employed to procure the breach or unless it was done for the purpose of injuring one of the parties or of benefiting the person procuring the violation at the expense of the injured contracting party.[5] When these opinions were reviewed by the House of Lords in a later case, some of the members of the tribunal declined to follow this reasoning and expressed the opinion that the basis of the action was the procuring of an unlawful act, namely, the violation of

[1] South Wales Miners' Federation et al. *v.* Glamorgan Coal Co. et al., L. R. (1905), A. C., 239.

[2] Read *v.* The Friendly Society of Operative Stone Masons of England et al., L. R. (1902), 2 K. B., 732 (Ct. of Appeal).

[3] Exchange Telegraph Co. *v.* Gregory, L. R. (1895), 1 Q. B., 147.

[4] National Phonograph Co. *v.* Edison-Bell Consolidated Phonograph Co., L. R. (1908), 1 Ch., 335 (Ct. of Appeal). See also Smithies *v.* National Association of Plasterers, L. R. (1909), 1 K. B., 310; Denaby & Cadeby Collieries *v.* Yorkshire Miners' Association, L. R. (1906), A. C., 384, 389; New Kleinfontein Co. *v.* Superintendent of Laborers, (1906) Transvaal Law Reps., S. C., 241; Long *v.* Larkin et al. (1914), 2 Irish Reports, 285, 329 (Ct. of Appeal).

[5] Lumley *v.* Gye, 2 El. & Bl., 216 (Q. B., 1853); Bowen *v.* Hall, L. R. (1881), 6 Q. B. Div., 333 (Ct. of Appeal); Temperton *v.* Russell, L. R. (1893), 1 Q. B., 715 (Ct. of Appeal).

the contract, and that the ill will of the party inducing the breach, or the fact that it was done for the purpose of benefiting him at the expense of the injured party, was not material.[1] This doctrine was expressly affirmed in a subsequent decision by the House of Lords,[2] and in a still later case, where no fraud, misrepresentation, or other unlawful means were employed and where there was no ill will between the parties, it was nevertheless held by that court that the defendants, who had procured a breach of contract, must answer in damages to the injured party.[3] Subsequently the court of appeal declined to hold a company liable for inducing a breach of contract where no unlawful means were employed and where the dealer violating the contract did so innocently and under mistake of fact; but awarded damages where fraud was employed in the inducement though the breach, so far as the party to the contract was concerned, was innocently made.[4] The effect of these decisions appears to be that in England no fraud, misrepresentation, coercion, or other unlawful means need be present to render the procurement of a breach of contract unlawful if the breach is such as would give rise to an action on the contract against the party violating it.

NATURE OF CONTRACT.—In the earlier English cases the courts appear to have been of the opinion that liability for procuring a breach of contract extended only to cases of enticing away or harboring another's servant, but in Lumley *v.* Gye[5] the court held that a contract for the service of an opera singer was sufficiently within the rule of master and servant to sustain the action. In later cases it has been held unlawful to procure a breach of a contract to make bricks and tile exclusively for another,[6] to purchase building materials,[7] and to purchase meat.[8] In a recent case, procuring a breach of a contract governing the sale of phonographs was also held unlawful.[9] And in a case in the House of Lords in 1897 Lord Herschell stated that "the law laid down in Bowen *v.* Hall in terms applies to all contracts, and I quite agree that the nature of the contract can make no difference."[10] The distinction, therefore, in this class of actions between contracts of hiring or for personal services and ordinary commercial contracts seems to have disappeared from the English law.

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[1] Opinions of Lords Watson and Herschell in Allen *v.* Flood, L. R. (1898), A. C., 1, 108, 119.

[2] Quinn *v.* Leathem, L. R. (1901), A. C., 495.

[3] South Wales Miners' Federation et al. *v.* Glamorgan Coal Co. et al., L. R. (1905), A. C., 239.

[4] National Phonograph Co. *v.* Edison-Bell Phonograph Co., L. R. (1908), 1 Ch., 335.

[5] 2 El. & Bl., 216 (Q. B., 1853).

[6] Bowen *v.* Hall, L. R. (1881) 6 Q. B., 333 (Ct. of Appeal).

[7] Temperton *v.* Russell, L. R. (1893) 1 Q. B., 715.

[8] Quinn *v.* Leathem, L. R. (1901), A. C., 495.

[9] National Phonograph Co. *v.* Edison-Bell Phonograph Co., L. R. (1908) 1 Ch., 335.

[10] Allen *v.* Flood, L. R (1898), A. C., 1, 126.

Section 3. Enticing employees from the service of competitors.

So far as appears from the reported cases, enticing a competitor's employees to leave his service in violation of their contracts and to enter the employment of rivals has been little resorted to as a competitive method.[1] A few cases have arisen, however, both in this country and in England, where in an effort to cripple a rival, his employees have been induced to leave him for service with a competitor, or the agents of a competitor have been induced to secretly represent its rivals in violation of a contract for exclusive services. The legal ground of liability in such cases is ordinarily that the employees have been induced or procured to violate their contracts of employment; but in some cases it is apparently made to depend in part on a conspiracy to injure a competitor's business or on a willful and malicious interference with it.

AMERICAN DECISIONS.

In a leading case in Massachusetts the supreme judicial court held that to obstruct and hinder the business of a shoe manufacturer by persuading and inducing a large number of persons in his employ to leave, and by inducing one of his employees to violate his contract of service, was unlawful and a cause of action for damages for the injury inflicted.[2] And where the salesman and local manager of a map

[1] The record in United States *v.* American Tobacco Co. et al. discloses considerable evidence showing that the defendant, in its efforts to drive an independent manufacturer out of business, had enticed its employees to leave it and enter the service of the defendant and had attempted also to cause strikes in its factories. United States *v.* American Tobacco Co. (Circuit Court, Southern District of New York), vol. II, record, p. 631; same case, Government's brief in the Supreme Court (1910), p. 254. See also People's Tobacco Co. *v.* American Tobacco Co., 170 Fed., 396, 400 (C. C. A., 1909).

In Hamilton Manufacturing Co. *v.* Tubbs Manufacturing Co. et al., 216 Fed., 401, 412 (1908), the inciting of strikes was charged among other things, but the evidence was conflicting and not sufficiently clear to justify granting the relief prayed for.

In Rice *v.* Standard Oil Co., 134 Fed., 464, 470 (C. C., 1905), it was alleged among other things that the defendant and its associates "bribed and bought out the plaintiff's sales agents, and caused the plaintiff's agents and employes to betray the trust confided to them by the plaintiff in his said business, and to wrongfully abandon the plaintiff's service and disregard their duty to the plaintiff in the course of his business." The court sustained a motion to dismiss the declaration on the ground that the averments were too vague, and observed that "none of the plaintiff's agents thus alleged to have been bribed or to have betrayed their trust is named."

[2] Walker *v.* Cronin, 107 Mass., 551 (1871). But see Boston Glass Manufactory *v.* Binney, 4 Pick., 428 (1827), where it was held lawful to induce a servant to leave his master when his term of employment should expire, although he might not previously have had any intention of quitting.

See also Tunstall et al. *v.* Stearns Coal Co., 192 Fed., 808, 810 (C. C. A., 1911), where it was alleged, among other things, that the defendants, former employees of the plaintiff and representatives of a labor organization known as the United Mine Workers, were, by the use of money, "hiring to discontinue work the company's employes who were remaining at work, and hiring to remain away or go elsewhere others who were intending to go to work in the company's mines." It was not alleged that any time contract relation existed between the company and the men so hired. The defendants were enjoined from "hiring or employing any of the employes of the plaintiff to quit the service of the plaintiff, and enjoined and restrained from hiring and paying any persons who are

company, on entering the service of a competitor, induced another employee also to leave and to enter the service of the new employer in violation of his contract, and was also attempting to entice others away, it was held that his former employer was entitled to an injunction restraining him from procuring its employees to leave in violation of their contracts.[1] Similarly where a company employed a traveling salesman under contract to sell for it exclusively, it was held that the company could recover damages from a rival which secretly induced the salesman to sell its goods as well.[2] In a recent New York case, however, it was held that damages could not be recovered for enticing away a competitor's employees in violation of their contracts of employment, unless fraudulent or otherwise unlawful means were employed.[3] In an earlier case the New York Supreme Court apparently held it actionable for a corporation engaged in refining oil, maliciously and with the intention of injuring a rival's business, to entice from the latter's service its superintendent, who had planned, located, and constructed its works, at the time when the company's refinery had been so far completed that it could commence distilling oil.[4]

Where an association of job printers procured a typographical union, by threats of declaring an open shop, to call out the union men in a competing establishment, with the object of compelling the latter to observe the rule of the association respecting the maintenance of prices for printing, it was held by the Supreme Court of Georgia that an injunction should issue restraining the association from "interfering with the plaintiff's business as a printer engaged in competitive trade, and from unlawfully influencing the labor organization from obstructing its business."[5] While conspiracy was alleged in this case, the court expressly stated that liability for maliciously interfering with the plaintiff's contracts with its employees was independent of the conspiracy. Similarly, the Supreme Court of Mississippi held that an insurance company could recover damages from other companies which, it was alleged, had conspired to injure it by maliciously and unlawfully persuading and intimidating its agent to leave its service by threats to drive him out of business as an insurance agent if he remained with the company.[6]

seeking employment of the plaintiff from engaging in the employment of the plaintiff. In other words, * * * from bribing the employes of the plaintiff to cease work for the plaintiff, or from bribing persons who are willing and desirous and about to enter its employ from so doing." An order for this preliminary injunction was affirmed.

[1] Kinney *v.* Scarbrough Map Co., 74 S. E., 772 (Ga. Sup. Ct., 1912).

[2] J. S. Brown Hardware Co. *v.* Indiana Stove Works, 96 Tex., 453 (1903).

[3] De Jong *v.* B. G. Behrman Co. et al., 131 N. Y. Supp., 1083 (Sup. Ct., App. Div., 1911).

[4] Buffalo Lubricating Oil Co. *v.* Everest, 3 How. Prac. Rep. (N. S.), 179 (N. Y. Sup. Ct., 1886).

[5] Employing Printers' Club *v.* Dr. Blosser Co., 122 Ga., 509 (1905).

[6] Globe & Rutgers Fire Insurance Co. *v.* Firemen's Fund Insurance Co. et al., 97 Miss., 148 (1910).

And in a recent case in the Federal courts relief was denied a complainant who sought to restrain a ball player from playing with a rival organization in violation of his contract with the complainant, where the latter had induced the player, previous to signing the contract, to break his then existing agreement to play with the rival organization, the ground of the decision being that the conduct of both complainant and defendant had been unconscionable, and the former not coming into court with clean hands would not be afforded relief.[1]

ENGLISH DECISIONS.

The legality of enticing away a rival's employees was before the English courts at least as early as 1774, when it was held that an employer could recover damages from a rival who induced his journeymen shoemakers to leave his service, though they were not hired for a determinate period.[2] Similarly, where a piano manufacturer invited a rival's workmen to dinner and after causing them to become intoxicated induced them to sign contracts of employment with him, it was held that the original employer could recover damages, and a verdict of £1,600 was held not excessive.[3] In another case, however, the court expressed the opinion that it was not unlawful to induce a servant to leave his master where there was no contract by which the master could require his services.[4]

In a leading case in the English court of appeal it has been held that it is unlawful to induce an artisan under contract to work exclusively for another to break his contract,[5] and the same principle was applied in a comparatively recent case where it was held that it is actionable to continue to employ ballet girls after notice that they were under contract to perform for a competitor.[6]

Section 4. Betrayal of trade secrets.

The right of business men to protection from the betrayal or unauthorized use of secret processes, machinery, formulas, or other secrets of their business has been frequently before the courts, especially in recent years. The profits resulting from the use of such secrets

[1] Weeghan *v.* Killifer et al., 215 Fed., 168 (D. C., 1914). For cases involving the legality of inducing violations of contracts of employment by others than competitors see Bixby *v.* Dunlap, 56 N. H., 456 (1876); Haskins *v.* Royster, 70 N. C., 601 (1874); Daniel *v.* Swearengen, 6 S. C., 297 (1875); Huff *v.* Watkins, 15 S. C., 82 (1880); Perkins *v.* Pendleton, 90 Me., 166 (1897); Thacker Coal & Coke Co. *v.* Burke, 59 W. Va., 253 (1906); Jackson *v.* Morgan, 94 N. W., 1021 (Ind. App. Ct., 1911).

[2] Hart *v.* Aldridge, 1 Cowper's Reps., 54 (1774). But that to induce a breach of a contract for an indeterminate period is not unlawful unless illegal means be employed, see Allen *v.* Flood, L. R. (1898), A. C., 1.

[3] Gunter *v.* Astor et al., 4 Moore C. P., 12 (1819).

[4] Nichol *v.* Martyn, 1–2 Espinasse, 732 (1799).

[5] Bowen *v.* Hall, L. R. (1881), 6 Q. B. Div., 333.

[6] De Francesco *v.* Barnum, 63 Law Times, 514 (Q. B., 1891). See also Fred. Wilkins & Bros. (Ltd.) *v.* Weaver, L. R. (1915), 2 Ch., 322.

have aroused the cupidity of trusted employees, inciting them to set up rival enterprises in an attempt to employ the knowledge acquired through their former employment. Competitors have also induced employees of rivals who were familiar with their trade secrets to take service or to embark in business with them, and in this way attempted to obtain the use of valuable methods.

A New York court, in the course of an opinion involving the legality of the use of secret processes of a business house by its former employees, observed that "This is not legitimate competition, which it is always the policy of the law to foster and encourage, but it is contra bonos mores and constitutes a breach of trust which a court of law—and much more a court of equity—should not tolerate."[1] A similar expression is found in another decision of the New York courts,[2] and in a still later case it was said, in a like connection, that "fair competition is always encouraged, but a man can not, through deceit * * * enter the household of his benefactor and steal his belongings."[3]

It is apparently established that a court of equity will restrain the disclosure or use of a trade secret[4] by one who has become familiar with it through confidential employment, or will enjoin its use by one who has acquired it with knowledge that the person from whom it was obtained had, because of the manner in which it came into his possession, no right to divulge it.

AMERICAN DECISIONS.

In accordance with this principle it was held by a New York court that a manufacturer of photographic supplies was entitled to an injunction restraining former employees from using his secret processes and appliances, with which they had become familiar while in his employ.[5] And where the former employees of a manufacturer of

[1] Eastman Kodak Co. *v.* Reichenbach et al., 79 Hun, 183, 194 (N. Y. Sup. Ct., App. Div., 1894).

[2] Little *v.* Gallus et al., 4 N. Y. App. Div., 569 (1896).

[3] Eastern Extracting Co. *v.* Greater New York Extracting Co. et al., 126 N. Y. App. Div., 928, 931 (1908).

[4] A trade secret has been defined by the Ohio Circuit Court as follows: "A trade secret is a plan, or process, tool, mechanism, or compound, known only to its owner and those of his employees to whom it is necessary to confide it in order to apply it to the uses for which it is intended. It is not protected by patent, for the secret then is made public, and the inventor is protected by letters patent from infringement thereof; while, as soon as anyone fairly and honestly discovers a trade secret, either by examination of the manufactured products sold or offered for sale to the public, or in any other honest way, that person discovering it has full right to use it." National Tube Co. *v.* Eastern Tube Co. et al., 3 Ohio C. C. Rep. (N. S.), 459, 462 (1902). The Pennsylvania Supreme Court says: "The character of the secrets, if they be peculiar and important to the business, is not material. They may be secrets of trade or secrets of title, or secret processes of manufacture, or any other secrets important to the business of the employer." Macbeth-Evans Glass Co. *v.* Schnelbach et al., 239 Pa., 76 (1913).

[5] Eastman Kodak Co. *v.* Reichenbach et al., 79 Hun, 183 (N. Y. Sup. Ct., App. Div., 1894).

typewriter ribbons engaged in a like business, they were restrained from using or disclosing the secret processes of their former employer.[1] Likewise, where a man entered the employ of a corporation, and, after remaining only long enough to become familiar with his employer's secret process of extracting alcohol from empty whisky barrels, left and organized a corporation to engage in the same business, it was held that neither the former employee nor his company could use the process.[2]

The same principle is invoked by the courts to protect the owners of secret but unpatented machinery and, under some circumstances, patterns for constructing machinery or other articles sold to the trade. Thus, where a corporation employed a mechanic to perfect a machine for manufacturing paper bags, under an agreement that it should belong to the employer, the employee was subsequently enjoined from manufacturing the machines for other parties.[3] Similarly, it has been held by the Supreme Court of Massachusetts that an engineer who had become familiar with his employer's secret machinery and process for manufacturing gunny cloth from jute butts, under an agreement that he would not use or disclose the information, should be restrained from constructing machinery for others, built on his former employer's models, and from imparting to them other secrets of the process of manufacture.[4] And where an employee learned his employer's secret process of manufacturing fly paper under circumstances which left no doubt that the process was regarded as a secret and that the employment was of a confidential character, the Supreme Court of Michigan restrained the employee from communicating the process.[5] So also the New York Court of Appeals held (1) that a manufacturer was entitled to an injunction restraining a rival, who had surreptitiously obtained copies of his patterns for making certain unpatented pumps, from using or disposing of them, and (2) that, as the dimensions of the patterns could not be determined from the parts of the completed pump, the sale of the pumps did not constitute such a publication of the secret of the specifications as to entitle the defendant to use the patterns so obtained.[6] In like manner it has been held that a former employee could be enjoined from using a secret process of manufacturing oils and greases where he had executed an affidavit not to use or disclose such process.[7] And where an employee of a steel company, under con-

[1] Little *v.* Gallus et al., 4 N. Y., App. Div., 569 (1896).
[2] Eastern Extracting Co. *v.* Greater New York Extracting Co. et al., 126 N. Y., App. Div., 928 (1908).
[3] Westervelt et al. *v.* National Paper & Supply Co., 57 N. E., 552 (Ind. Sup. Ct., 1900).
[4] Peabody *v.* Norfolk, 98 Mass., 452 (1868).
[5] O. & W. Thum Co. *v.* Tloczynski, 114 Mich., 149 (1897).
[6] Tabor *v.* Hoffman, 118 N. Y., 30 (N. Y. Ct. of App., 1889).
[7] Fralich *v.* Despar, 165 Pa., 24 (1894).

tract not to disclose a secret process and formula for making certain products, was enticed from its service by a competitor for the purpose of securing his knowledge of the process, the court not only restrained the employee and the rival company from using or divulging such secrets but also enjoined the company from continuing him in its employ.[1] So where, as a condition of the sale of a business, its former manager contracted with the purchaser to enter his employ, disclose to him all the secret processes of the business known only to the manager, and not thereafter to disclose them to anyone else nor to use them in the business of any other person, it was held that the purchaser was entitled to an injunction restraining the manager from using in a rival business the secret processes known to him at the time his employer purchased the business, as well as other secrets subsequently disclosed to him during the course of his employment.[2]

As in the case of secret machinery or appliances or secret processes of manufacture, the owners of secret formulas for the manufacture of articles of commerce may enjoin their use or disclosure by former employees or by others who have obtained them in an inequitable manner. Thus where the president of a glass company had discovered a formula for making semitranslucent glass and had turned it over to his superintendent to make the necessary experiments in the factory furnaces, the Supreme Court of Pennsylvania decided that the superintendent could not subsequently use the formula for his own benefit, notwithstanding the fact that in the course of the experiments conducted for his employer he had himself discovered that satisfactory results could only be had from the formula by melting the glass a specified time, and that if this time were varied from, the product would not be of the desired quality. The company to which the superintendent disclosed the formula was also enjoined from making or selling glass manufactured by using the essential ingredients of the secret formula.[3] In like manner, where the owner of a secret formula for compounding a medicine sold it, and his son, who was familiar with the formula, entered the employ of the purchaser under an agreement not to divulge the recipe nor to sell any similar medicine in a specified territory, the Federal circuit court held that the employee could not manufacture and sell

[1] Taylor Iron & Steel Co. *v.* Nichols et al., 61 Atl., 946 (N. J. Eq., 1905).

[2] National Gum & Mica Co. *v.* Braendly, 51 N. Y. Supp., 93 (Sup. Ct., App. Div., 1898).

[3] Macbeth-Evans Glass Co. *v.* Schnelbach et al., 239 Pa., 76, 87 (1913). Per Elkin, J.: "To be entitled to equitable relief the burden was on the appellee [plaintiff] to show (1) that there was a trade secret, or, as in the case at bar, a secret process of manufacture; (2) that it was of value to the employer and important in the conduct of his business; (3) that by reason of discovery or ownership the employer had the right to the use and enjoyment of the secret; and (4) that the secret was communicated to Schnelbach while he was employed in a position of trust and confidence under such circumstances as to make it inequitable and unjust for him to disclose it to others, or to make use of it himself, to the prejudice of his employer."

a substantially identical preparation. In this case the court apparently lays down the rule that where a secret formula is sold a court of equity will not permit either the vendor, or the members of his family familiar with it and knowing of the sale, to use it.[1] So also a New Jersey court refused to permit the president of a corporation who discovered secret formulas or processes for the manufacture of ink, to sell or use them, where he had, while managing the business during a receivership, represented the recipes to be a part of the assets of the corporation, the court being of opinion that his whole course of conduct raised an implied contract that the formulas passed to the purchaser at the receiver's sale.[2] And it has been held that a company engaged in the manufacture of pharmaceutical preparations could restrain a former employee from using its secret formulas in the manufacture of preparations for a rival company.[3]

Apparently, also, an injunction may issue to prevent the disclosure of a secret method of compounding certain chemicals, although all of the ingredients of the compound are known to others. For example, where a manufacturer had, by much experimenting in mixing chemicals, produced a satisfactory preparation to be used in tanning hides, the court enjoined both a former employee and a rival corporation to whom he had disclosed it, from using or divulging the process, though the latter was familiar with all the ingredients and had used them, though less successfully, in the manufacture of a preparation used for the same purpose.[4] And a corporation which used a peculiar mixture of metals to compound a bell metal, and had by experimenting determined the forms, sizes, and weights of the bells which could be satisfactorily produced from the metal, was granted an injunction restraining a former foreman in its factory from communicating this information to others.[5] On the other hand, manufacturing processes, machinery,

[1] Simmons Medicine Co. et al. *v.* Simmons, 81 Fed., 163 (C. C., 1897).

[2] Pomeroy Ink Co. *v.* Pomeroy, 77 N. J. Eq., 293 (1910).

[3] G. F. Harvey Co. *v.* National Drug Co. et al., 77 N. Y. Supp., 674 (Sup. Ct., App. Div., 1902).

[4] Stone *v.* Goss et al., 65 N. J. Eq., 756 (Court of Errors and Appeals, 1903). Per Swayze, J.: "The injunction should not be refused, because the process was such that it would probably have been discovered by independent experiments in the manipulation of the ingredients of which the products of both parties were alike composed. The Grasselli Chemical Co., by its own conduct, has put itself in such a position that it may even lose the advantage of future independent experiments. It would be quite impossible hereafter to decide how much of the improvement in the product of the Grasselli Chemical Co. would be attributable to its own independent efforts and how much to the knowledge of Stone's process fraudulently acquired by it. Every doubt must be resolved against the parties to a fraudulent act. If the defendant thereby suffers, it suffers only by reason of having been a party to Goss' fraudulent disclosure of the secret."

[5] Cincinnati Bell Foundry Co. *v.* Dodds et al., 10 Ohio Decisions, Reprint 154 (Superior Court of Cincinnati, 1887). For other cases, see White Dental Mfg. Co. *v.* Mitchell, 188 Fed., 1017 (C. C., 1911); Phila. Extracting Co. *v.* Keystone Extracting Co., 176 Fed., 830 (C. C., 1910); Union Switch & Signal Co. *v.* Sperry, 169 Fed., 926 (C. C., 1909); Adams Co. *v.* Knapp, 121 Fed., 34 (C. C. A., 1903); Jones *v.* Baker, 7 Cow., 445 (N. Y. Sup. Ct., 1827).

or formulas must apparently have some characteristic distinguishing them from others in general use in the trade in order that they may be protected as trade secrets. On this ground a New York court has held that a manufacturer could not prevent others from using a formula or process for making soap where the "method consisted in the exercise of great care in the selection of well-known materials previously in use in the trade, and in their combination and mixture in certain proportions, also approximately observed by other manufacturers, by means of appliances also more or less known to others."[1] Likewise, where the combined efforts of the employees of a tube mill had resulted in a certain individuality in the patterns and castings, but it appeared that approximately the same mills could be constructed by any competent engineer, it was held that the patterns were not a trade secret and that a rival manufacturer could retain castings made from such patterns surreptitiously taken from the mill by an employee, although the court directed the return of the patterns themselves.[2] And it has been held that an injunction should not issue where the general principles of the machinery which a manufacturer sought to prevent a competitor from using were well known to machinists and had been merely adapted to the complainant's use, and where it also appeared that no precautions had been taken to keep the machinery a secret from any of the company's employees.[3] It has also been held that an employee who assisted in perfecting machinery, but was not employed for the purpose of making inventions, could not be enjoined from engaging in the same business, it not appearing that he had constructed or used any machines, processes, or formulas in which the employer had any exclusive right.[4]

PARTIES WHO MAY BE ENJOINED FROM USING TRADE SECRETS.—While the courts will enjoin the use or disclosure of trade secrets not only by an employee, but also apparently by anyone coming into possession of the information with knowledge of its confidential nature or of the confidential character of the employment of the person from

[1] Bell & Bogart Soap Co. *v.* Petrolia Mfg. Co., 54 N. Y. Supp., 663, 664, 665 (Sup. Ct., 1898).

[2] National Tube Co. *v.* Eastern Tube Co. et al., 3 Ohio Cir. Ct. Rep. (N. S.), 459 (1902); affirmed by Sup. Ct., 69 Ohio State, 560 (1903); Cf. Vulcan Detinning Co. *v.* American Can Co., p. 363.

[3] Hamilton Mfg. Co. *v.* Tubbs Mfg. Co., 216 Fed., 401 (C. C., 1908); not reported until 1914.

[4] American Stay Co. *v.* Delaney, 211 Mass., 229 (1912). Per Braley, J.: "No obligation rested upon him to forego the exercise of his inventive powers, even if they were incited because of knowledge necessarily derived from the performance of his contractual duties. It was legitimate for him, under these conditions, to invent and perfect improvements which were embodied in new machines of greater capacity and efficiency." See also Mahler *v.* Sanche, 223 Ill., 136 (1906).

whom it was obtained,[1] it has been held that if such secrets have been acquired in good faith, without any knowledge of another's prior right thereto, or of any facts which would put the person so acquiring them on notice thereof, their use will not be enjoined. Thus the court refused to restrain the use of a secret formula by one who had purchased it without knowledge of a prior sale to another party, the court stating that the remedy of the first purchaser was to sue the seller for breach of contract not to disclose the formula to others.[2] In like manner, where the administrator of an estate had given a secret formula to one person, but had subsequently conveyed it to another, it was held that neither party could restrain the other from using it.[3]

AGREEMENT NOT TO DISCLOSE SECRETS IMPLIED.—While the earlier suits to prevent the disclosure or use of trade secrets were usually based upon an express contract not to divulge them,[4] later decisions hold that an express contract is not required, but that it is sufficient if the person divulging or seeking to use the secrets occupied a position of trust and confidence and the information came to him in the course of his employment. In accordance with this principle, the Supreme Court of Indiana declares that if the servant knew at the time of his employment that his employer had a process or machinery the nature and particulars of which he desired to keep secret, the law will imply a promise not to divulge or use the secret.[5] A New York court states the correct rule to be that the law raises an implied contract that an employee who occupies a confidential relation toward his employer will not be permitted to divulge any trade secrets imparted to him or discovered by him in the course of his employment.[6] Similarly, the Supreme Court of Michigan states that if it is clearly established by all that was said and done that the secrets were not to be used by the employee except while in the employ of those who imparted them to him, nor divulged by him to others, and that this was one of the conditions of his employment, an injunction will issue to prevent the servant from divulging or

[1] Tabor *v.* Hoffman, 118 N. Y., 30 (N. Y. Ct. App., 1889); Eastern Kodak Co. *v.* Reichenbach et al., 79 Hun, 183 (N. Y. Sup. Ct., App. Div., 1894); Westervelt et al. *v.* National Paper & Supply Co., 57 N. E., 552 (Ind. Sup. Ct., 1900); Eastern Extracting Co. *v.* Greater New York Extracting Co. et al., 126 N. Y. App. Div., 928 (1908); Peabody *v.* Norfolk, 98 Mass., 452 (1868); Stone *v.* Goss et al., 65 N. J. Eq., 756 (Court of Errors and Appeals, 1903); Macbeth-Evans Glass Co. *v.* Schnelbach et al., 239 Pa. 76 (1913).

[2] Stewart *v.* Hook, 118 Ga., 445 (1903).

[3] Chadwick *v.* Covell, 151 Mass., 190 (1890); Covell *v.* Chadwick, 153 Mass., 263 (1891). See also Watkins *v.* Landon, 54 N. W., 193 (Minn. Sup. Ct., 1893); Marshall *v.* Pinkham, 52 Wis., 573 (1881).

[4] For cases involving the validity of express contracts not to disclose trade secrets, see Fowle *v.* Park, 131 U. S., 88 (1889); Park *v.* Hartman, 153 Fed., 24 (C. C. A., 1907).

[5] Westervelt et al. *v.* National Paper & Supply Co., 57 N. E., 552 (Ind. Sup. Ct., 1900).

[6] Little *v.* Gallus et al., 4 N. Y., App. Div., 569, 574 (1896).

using the secrets.[1] In a leading case in New York, the court declares that where a confidential relation exists the law raises an implied contract that the employee will not divulge any trade secrets imparted to him or discovered by him in the course of his employment, and that a disclosure of such secrets thus acquired is a breach of trust and a violation of good morals, which a court of equity should intervene to prevent.[2]

ENGLISH DECISIONS.

The distinction between technical trade secrets and confidential information of a general character is not sharply drawn in the English decisions. Trade secrets and information regarding an employer's business, imparted to employees or associates in confidence, or necessarily acquired by them in the course of their employment, are both protected by the English courts. Decisions of this character have been considered together in the following section.

Section 5. Betrayal of confidential information.

In order that the aid of the courts may be invoked to prevent the use or disclosure of business secrets, it is apparently not necessary that they shall be such as may be technically defined as trade secrets—that is, secret processes, tools, machinery, formulas, etc. It is apparently sufficient if the information which it is sought to prevent others from using pertains to the business of the parties seeking relief, that it is in fact of a confidential character, and that it was imparted to the employee for the purpose of being used in his employer's business and only for his benefit.

As in the case of trade secrets, the courts have said that for an employee to use the confidential information of his former employer in a rival business, or for a company to hire the employees of a competing concern for the purpose of securing confidential information respecting its business, amounts to "unfair" or "inequitable" competition. Thus in New York, where an employee resigned, entered the service of a competitor, and proceeded to solicit the business of those persons whom he had canvassed for his former employer, the court said:

> In recent years there has been developed, by the adjudication of our courts and by legislation, a considerable body of law looking toward the protection of the business world against unfair competition, and, if we correctly interpret these decisions, a court of equity stands ready to restrain such acts.[3]

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[1] O. & W. Thum Co. *v.* Tloczynski, 114 Mich., 149 (1897).

[2] Eastman Kodak Co. *v.* Reichenbach et al., 79 Hun, 183, 193 (N. Y. Sup. Ct., App. Div., 1894). See also Stone *v.* Goss et al., 65 N. J. Eq., 756 (Ct. of Errors and Appeals, 1903); Wiggins Sons Co. *v.* Cott-A-Lapp Co., 169 Fed., 150 (C. C., 1909); Macbeth-Evans Glass Co. *v.* Schnelbach et al., 239 Pa., 76 (1913).

[3] Witkop & Holmes Co. v. Boyce, 112 N. Y. Supp., 874, 878 (Sup. Ct., 1908); affd. 115 N. Y. Supp., 1150 (Sup. Ct., App. Div., 1909).

In a later case, involving practically identical facts, the same court said:

> It is unfair for the defendant to take advantage of knowledge imparted to him in confidence and use the knowledge to destroy plaintiff's business. * * * The defendant's use of confidential communications, communicated to him by plaintiff for its benefit, for the purpose and with the intent to secure plaintiff's customers as the customers of the plaintiff's rival and competitor, is so grossly unfair and unjust, and the injury and damage inflicted upon plaintiff's property rights are so incapable of being ascertained, the conclusion is necessarily reached that plaintiff is entitled to the judgment and decree of this court * * *.[1]

And, again, by the same court on similar facts:

> This is a case not of malicious interference with contracts where equity refuses to interfere unless the services are of a unique and special character, but of unfair competition.[2]

AMERICAN DECISIONS.

A question which has frequently been raised in suits involving the use or betrayal of confidential information is whether a former employee may make use of lists of customers which he may have taken with him on leaving his employment or which he may retain in his memory. This question has recently been considered in the Supreme Court of New York in several cases arising out of the same set of facts. An employee of the Witkop & Holmes Co. who solicited trade and delivered goods from house to house, on entering the service of the company had been supplied with a card list of patrons to be served. On leaving this employment he returned this list and entered the service of a rival company, for which he immediately began to solicit the patrons of his former employer. On suit being instituted by the latter, the court issued an injunction restraining the defendant from calling upon those persons whose names appeared in the card list furnished him by the Witkop Co. and used by the defendant while engaged with it.[3]

In a previous case brought by the same company to restrain similar conduct by another employee, the court held that the plaintiff was

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[1] Witkop & Holmes Co. *v.* Boyce, 118 N. Y. Supp., 461, 465 (Sup. Ct., 1909).

[2] Witkop & Holmes Co. *v.* Great Atlantic & Pacific Tea Co., 124 N. Y. Supp., 956, 958 (Sup. Ct., 1910).

[3] Witkop & Holmes Co. *v.* Boyce, 118 N. Y. Supp., 461, 464 (Sup. Ct., 1909). Per Brown, J.: "The obligation of an employee not to divulge or use confidential knowledge gained in the course of his employment to the prejudice of his employer is the foundation of every contract of hiring. It is unfair for the defendant to take advantage of knowledge imparted to him in confidence and use that knowledge to destroy plaintiff's business. The defendant furnished an employee of plaintiff's competitor with information of plaintiff's customers for the purpose and which was used by such employee in making deliveries for such competitor, and he claims the right to personally go over the route, call upon each customer of the plaintiff whose name and address had been furnished him for the purpose of plaintiff's business, solicit orders for plaintiff's competitors, take up plaintiff's trading-stamp books from such customers, and issue a trading book of like stamp value to the customer furnished by plaintiff's competitor. If such conduct must be approved and adjudged to be right, proper, and lawful, there would seem to be no limitation upon the gross betrayal of confidence by an unscrupulous employee."

entitled to an injunction restraining the defendant from interfering with the trade, custom, or good will of his former employer, and from making use of the knowledge or information gained from his list of customers, and from canvassing and soliciting orders from his former customers.[1]

Subsequently the Witkop Co. instituted suit to restrain its competitor, the Great Atlantic & Pacific Tea Co., from hiring away its drivers or solicitors for the purpose of soliciting the patronage of customers formerly served by them, and the court held that an injunction should be granted both on the equitable principles on which the previous cases had been decided and under the New York statute making it a penal offense to secure lists of customers from another.[2]

Similarly, it has been held that a laundry company was entitled to an injunction restraining a former driver of its wagons, who left its service for that of a competitor, from soliciting or receiving laundry from any persons who were customers of the company at the time he left its employ and who were on the routes worked by the driver.[3] And where an optical company engaged an employee to examine the eyes of customers, to prescribe glasses, and, as a part of his duties, to record the names and addresses of patrons and the sort of lenses required by them, it was held that the employee should be restrained, on leaving the company's employment, from using the names and addresses of its customers surreptitiously copied from its records, from soliciting the patronage of such customers whose names he thus obtained and from divulging the names and addresses of these customers to anyone else.[4] Likewise, in an early case in the Cincinnati Superior Court the employees of a bakery, including the drivers employed on the wagons, who left in a body and started a

[1] Witkop & Holmes Co. *v.* Boyce, 112 N. Y. Supp., 874 (Sup. Ct., 1908), affd. 115 N. Y. Supp., 1150 (Sup. Ct., App. Div., 1909).

[2] Witkop & Holmes Co. *v.* Great Atlantic & Pacific Tea Co., 124 N. Y. Supp., 956 (Sup. Ct., 1910). Per Pound, J.: "It follows that defendant tea company and its officers and agents will be restrained from obtaining the benefit of plaintiff's list of customers by hiring drivers away from the plaintiff for the purpose of having them canvass and solicit trade from the plaintiff's customers formerly served by them. That this was done in the case of Wahl and other drivers admits of no doubt.

"The defendant tea company undoubtedly has the right to solicit the trade of plaintiff's customers, and to obtain a list thereof by using opportunities for observation open to all. Plaintiff had no vested property rights in the trade of such customers. The vice of defendant's position is that it obtained the lists or copies thereof by hiring the drivers and made the lists of value to itself by sending the drivers to transfer, if possible, the trade from their former employer to their new employer. In other words, although the end might be lawful, the means adopted were unlawful. This is a case not of malicious interference with contracts where equity refuses to interfere unless the services are of a unique and special character, but of unfair competition. * * * The conduct of defendants amounts to an unlawful obtaining and use of a trade list." (See N. Y. Consolidated Laws (Penal Law, chap. 40), sec. 553, subds. 6, 7.)

[3] Empire Steam Laundry Co. *v.* Lozier, 130 Pac., 1180 (Cal. Sup. Ct., 1913).

[4] Stevens & Co., v. Stiles, 29 R. I., 399 (1909).

rival business, were enjoined from interfering with their former employer's customers.[1]

In an unreported case in the same court a driver of a milk wagon, who left his employer to serve a rival, was enjoined from soliciting the patronage of his former employer's customers on the route he had served for him; and in another case an injunction was granted restraining an employee of a newspaper from selling its subscription list to a rival paper.[2]

And an Illinois court has issued an injunction restraining a bookkeeper and clerk, when he started a rival business, from in any manner corresponding with his former employer's agents or customers or soliciting them to buy his goods. It was held in a subsequent action for a violation of the injunction that the clerk was prohibited not only from opening a correspondence with such customers but from selling to customers who had themselves initiated the correspondence.[3]

But the Michigan Supreme Court held, apparently contrary to the rule announced in the above cases, that while an employee of a tea company on engaging with a rival company should be enjoined from using any list of his former employer's customers, or a copy thereof which he might have made or retained, a State statute precluded the court from enjoining the employee from soliciting the trade of such of these customers as he could remember.[4]

Apparently an important question in the class of cases summarized above is whether an employee may solicit on his own behalf or for a new employer, those customers whom he has secured by his own efforts and industry for a former employer. In other words, whether his obligation is to refrain from soliciting only those customers whose names were communicated to him by his former employer. It has been held on several occasions that he is under the same obligation as to both classes of customers. Thus the Supreme Court of California was of the opinion that where a part of the duties imposed on the driver of a laundry wagon was to solicit new business and to keep a complete and confidential list of all customers, he should not be permitted on leaving his employer to canvass or receive business of these patrons for a rival.[5]

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[1] Smith *v.* Kernan, 8 Ohio Dec., Reprint 32 (Sup. Ct., Cincinnati, 1880).

[2] See statement of the court in Smith *v.* Kernan, 8 Ohio Dec., Reprint 32.

[3] Loven *v.* The People ex rel. Fahrney & Sons Co., 158 Ill., 159 (1895).

[4] Grand Union Tea Co. *v.* Dodds, 164 Mich., 50 (1910). The statute referred to by the court provides as follows: "All agreements and contracts by which any person, copartnership or corporation promises or agrees not to engage in any avocation, employment, pursuit, trade, profession or business, whether reasonable or unreasonable, partial or general, limited or unlimited, are hereby declared to be against public policy and illegal and void." (Public Acts, 1905, act. 329, sec. 1.)

[5] Empire Steam Laundry Co. *v.* Lozier, 130 Pac., 1180 (Cal. Sup. Ct., 1913).

And in Witkop & Holmes Co. *v.* Boyce,[1] although it does not appear in the statement of facts that some of the customers in question were obtained by the personal efforts of the employee, such appears to have been the case, for the court says:

> It is contended that the customers named in the complaint are the defendant's customers and not the customers of the plaintiff. In this view we can not concur. The contract with the defendant was one of hiring. He was employed and agreed to enter the plaintiff's service as a salesman, canvasser, collector, and delivery man, such employment to be at all times under the direction and supervision of the plaintiff. It does not need argument to show that, under such circumstances, every customer procured was a customer of the plaintiff and not of the defendant.

And in a case in the Rhode Island Supreme Court it was held that an employee of an optical company, who, on leaving, took with him only the names of the customers whose eyes he had examined and for whom he had prescribed, should, nevertheless, be restrained from soliciting the patronage of these customers.[2]

On the other hand a different rule apparently prevails as to the right of a general insurance agent, as distinguished from other employees or agents, to solicit policyholders whom he secured for a company, on leaving its service and entering that of a competing company. Thus where the general agent of an insurance company had acquired his knowledge of those insured by his employer, not from the latter, but by reason of the fact that he had himself procured their contracts of insurance, the court held that the agent should not be restrained from soliciting the policyholders to transfer their policies to a competing company whose agent he had become;[3] and the appellate court of Illinois has reached a similar conclusion upon substantially identical facts.[4]

In like manner where a general agent representing several insurance companies sold his business and turned over the records of his

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[1] 61 N. Y. Misc., 126.

[2] Stevens & Co. *v.* Stiles, 29 R. I., 399 (1909). Per Johnson, J.; "Particular stress is laid upon the claim that the only names copied from the complainant's lists were those of customers whom the respondent personally examined, and it is argued that to copy and use such a list of names is not a breach of trust or a breach of confidence. The argument does not commend itself to us. It is elementary that what is done by the agent in the course of his employment is in a legal sense done by the master himself. The respondent could have no more right to copy records made by himself while acting for the complainant than he would have to copy any other records of the complainant to which he had access."

[3] Stein *v.* National Life Association, 105 Ga., 821 (1899). Per Fish, J.: "The relation of Stein to the association was not a confidential one in the sense that he, by reason of it, acquired a knowledge of any business secrets. * * * That knowledge of the policyholders which would be useful to him, in the event of his representing as agent another company, was not confided to him by the association, if derived from it at all. Persons may have taken out policies in the association on account of personal friendship for Stein or confidence in his integrity, and there is no reason why he should not be allowed to solicit their business for another company which he represents, his agency for the association having been terminated."

[4] American Insurance Co. *v.* France, 111 Ill. App., 382 (1903).

office to the purchaser, it was held by a New York court that one of the companies, who refused to appoint the latter as its agent, was entitled to the possession of such records as it had directed its former agent to keep, and to an injunction restraining the agent from using any information obtained exclusively from these documents in soliciting business of policy holders in the company. It was further held, however, that the purchaser of the business could retain a record which the former agent had kept for his own information, containing, among other things, the names and addresses of policy holders in the plaintiff company and dates of expiration of the policies.[1]

The same general principles have been held to apply to the general manager of a national advertising agency. For example, where the Chicago manager of such an agency brought with him on entering its service a large clientele of his own, and after two years in its employ reentered the same line of business for himself, it was held by a Federal court that he should not be restrained from receiving and soliciting business from advertisers with whom he had contracted on behalf of his former employer and who were still under contract with the company.[2]

A further question in these cases is whether an employee may be enjoined from making use of knowledge of his employer's customers which he retains in his memory, or whether his obligation is merely not to use lists or copies thereof which he has in his possession in tangible form. The New York Supreme Court has held that an employee may not solicit from the customers of his former employer

[1] National Fire Insurance Co. *v.* Sullard, 97 N. Y. App. Div., 233 (1904). Per Hooker, J.: "The uncontradicted evidence tends to show, and the custom is so universal that the court may take judicial notice, * * * that the business of a fire insurance agent, at least in the smaller cities and towns, is to represent contemporaneously several insurance companies, and consists in soliciting persons to permit the agent to place insurance for them, or in being solicited by those desirous of being insured, for the same purpose. Only in rare cases do those who seek insurance express preference for any one fire insurance company over another, or request that their insurance be placed in any particular company. The proof in this case tends to show that, for the three and one-half years Shipman was the agent of the plaintiff and other companies, he was rarely, if ever, requested to place insurance with any particular company, and exercised his own judgment in determining with which of the insurance companies he represented he would place the insurance.

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"The policyholder was free to renew with any company he might see fit or not to renew his policy at all. Shipman procured the insurance for the plaintiff in the first place from customers or patrons of his own. It is entirely lawful for the defendant, so long as he does not use for that purpose the information gathered exclusively from the plaintiff's property, to solicit these customers and patrons in behalf of any insurance company he may see fit, the plaintiff or any other, so long as he does not abridge the enjoyment by the plaintiff of his beneficial interest in existing contracts of insurance by inducing improper cancellations."

But see Scottish Union and National Insurance Co. *v.* Dangaix, 103 Ala., 388 (1893), where the Supreme Court of Alabama in a case in which it was not called upon to decide the point, expressed the opinion that the agent of an insurance company has no legal right on leaving the company to solicit the policyholders to cancel the policies procured for the company by the agent during the term of his employment.

[2] Proctor & Collier Co. *v.* Mahin et al., 93 Fed., 875 (C. C., 1899).

where the list of customers is in fact confidential.[1] Similarly the supreme courts of Rhode Island and California and the Cincinnati superior court have approved decrees sufficiently broad not only to prevent employees from using copies of lists of customers which they had taken away with them, but also to prevent them using knowledge of these customers regardless of the form in which it had been retained.[2] But the Supreme Court of Michigan refused to enjoin a former employee from soliciting those of his late employer's customers whose names he could remember.[3]

CONFIDENTIAL CHARACTER OF SOURCES OF SUPPLY, COSTS, ETC.—In some instances it has been held that an employer may restrain the disclosure of the sources from which he purchases supplies, the merchants to whom he sells, or his costs. Thus where an employee of a catalogue house, on leaving to start a rival business, took with him a list of retail merchants under contract to buy from his employer he was enjoined from approaching any merchant on the list or from approaching or interfering with his late employer's salesmen for a period of 10 months; and from using or copying his catalogue.[4] Similarly a temporary injunction has been issued by a New York court restraining a former employee of a loan company from divulging to a rival anything "concerning the system, forms, or methods" of the business and from sending letters to her former employer's customers "relating to such matters," until the final determination of the case.[5] And a dealer who secured the secret-code system of a company, showing the cost and selling price of its goods, from one of its traveling salesmen was compelled by the Dakota courts to deliver the catalogue into which he had copied the code to a receiver appointed by the court.[6] So also where a corporation engaged in the manufacture of steel cars supplied railroads with blue prints to enable them to order repair parts, it was held that the manufacturer could compel a rival corporation to return copies of

[1] Witkop & Holmes Co. *v.* Boyce, 118 N. Y. Supp., 461 (1909).

[2] Stevens & Co. *v.* Stiles, 29 R. I., 399 (1909); Empire Steam Laundry Co. *v.* Lozier, 130 Pac., 1180 (Cal. Sup. Ct., 1913); Smith *v.* Kernan, 8 Ohio Dec., Reprint 32 (Cincinnati Sup. Ct., 1880).

[3] Grand Union Tea Co. *v.* Dodds, 164 Mich., 50 (1910). Per Hooker, J.: "We are of the opinion, however, that he (the defendant) can not be restrained from selling his commodities, for himself or for any employer, in any part of the city, or to any person, so long as he does not use any property belonging to the complainant, or copies thereof that were surreptitiously made. So far we think ourselves well within equity jurisdiction, on general principles. The statute precludes an injunction restraining the defendant from soliciting anyone to purchase his wares, notwithstanding he may remember that they were his patrons while he was employed by the complainant." (See pp. 157, 358n.)

[4] Merchants Syndicate Catalogue Co. *v.* Retailers Factory Catalogue Co. et al., 206 Fed., 545 (D. C., 1913).

[5] Tolman *v.* Mulcahy, 103 N. Y. Supp., 936 (Sup. Ct., App. Div., 1907). See also Oxypathor Co. *v.* De Cordero et al., 149 N. Y. Supp., 513 (Sup. Ct., App. Div., 1914).

[6] Simmons Hardware Co. *v.* Waibel et al., 11 L. R. A., 267 (S. Dak. Sup. Ct., 1891).

the prints obtained from the railroads which it was using in the manufacture of similar cars.[1]

INFORMATION GENERALLY KNOWN TO THE TRADE MAY BE USED.—But no obligation rests upon employees not to disclose information respecting their employers' customers or other details of his business unless it is in fact of a confidential character; nor may an employee be prevented from using for himself or a competitor of his former employer ordinary business skill or general knowledge of an industry acquired in the course of his employment. Thus, in a recent case the New York Supreme Court held that a wholesale dealer could not restrain a salesman from soliciting the trade of customers whose names and addresses and whose individual preferences he had learned while in the dealer's employ, where it appeared that these customers were dealers in dairy products and were listed in a city directory, and also that they did not buy exclusively from the plaintiff, but dealt more or less constantly with others.[2]

Shortly before this the appellate division of the New York Supreme Court had refused to grant a temporary injunction on the ground that it was not clearly shown that the information in question had been given in confidence.[3] And where a saleswoman employed by a corset manufacturer had apparently been supplied with information respecting the advantages to the wearer of a peculiar make of corset, for the purpose of delivering lectures, and had been taught his methods of demonstrating the garment, the Iowa Supreme Court was of the opinion that she might make use of this knowledge and experience in the employ of a competitor.[4]

In like manner a New Jersey court refused to restrain a former employee from divulging any information "of any nature now known to him, or hereafter acquired by him * * * relating to or regarding any process of steel making or molding or treating steel that may have been, is now, or may be hereafter during the term of this agreement used in the works" in which he was employed, although these were the terms of his contract of employment.[5]

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[1] Pressed Steel Car Co. *v.* Standard Steel Car Co., 210 Pa. St., 464 (1904).

[2] Boosing *v.* Dorman, 148 N. Y. App. Div., 824 (1912).

[3] Peerless Pattern Co. *v.* Pictorial Review Co., 132 N. Y. Supp., 37 (Sup. Ct., App. Div., 1911).

[4] Gossard Co. *v.* Crosby, 132 Iowa, 155 (1906).

[5] Taylor Iron & Steel Co. *v.* Nichols et al., 69 Atl., 186 (N. J. Ct. of Errors and App., 1908). Per Swayze, J.: "The contract not only forbids Nichols to disclose any secret of the complainant, but also any knowledge he might have relating to the process of making steel that may have been used in the complainant's works, whether matter of common knowledge or not, whether known to him before he entered their employment or not; and it also requires him to hold inviolate not only the secrets of the complainant, but his own secrets, if he had any, and treatments or processes, whether secret or not. The necessary result of the enforcement of the contract would be that Nichols must either work for the complainant or remain idle; and, since the restraint is unlimited in point of time or place, he might, at the option of the complainant, after the expiration of five years be without employment for the rest of his life at the only trade he knows."

In an earlier case the New Jersey court had refused an injunction restraining the defendants from violating a contract not to divulge to anyone where or from whom their former employer purchased his materials or to whom he sold his goods or the price at which he bought or sold, the court saying that an agreement of this nature might well be regarded in the absence of anything to the contrary in its terms, as limited in its obligation to the time of the employment.[1]

DIRECTORS OF CORPORATIONS MAY NOT DISCLOSE CONFIDENTIAL INFORMATION.—The obligation not to disclose or make use of confidential information obtained in the course of employment has been held applicable to the director of a corporation. Thus, where a corporation conducted a business which was dependent for its success largely upon a secret formula which it had purchased in a foreign country, it was held that a director, who had acquired a knowledge of the formula by reason of his position, as well as other employees of the company to whom it was necessary to disclose it, could not use it in a rival business, notwithstanding the fact that the formula was known to others and the further fact that subsequent to the filing of the suit the rival corporation had purchased the formula from a party in Europe who claimed to be the true owner.[2] Likewise the secretary of a corporation was held to be justified in forcibly taking its letter files from one of the directors who was securing data therefrom for the benefit of a rival corporation, in the organization and management of which he was active.[3] A similar doctrine was applied by the Iowa courts, where it was held that a corporation might lawfully

[1] Salomon *v.* Hertz et al., 40 N. J. Eq., 400 (1885). Cf. Gorham Mfg. Co. *v.* Emery-Bird-Thayer Dry Goods Co. et al., 92 Fed., 774 (C. C., 1899); affd. 104 Fed., 243 (C. C. A., 1900). This was an action in form to restrain the defendants from passing off inferior silverware as that of the complainants' manufacture. At the trial, however, it appeared that the real purpose of the action was to prevent the defendants from selling the complainants' silverware at lower prices than those maintained by retail jewelers, and with this end in view several of the defendants' employees were asked, on cross-examination, from whom they purchased goods of the complainants' manufacture. The witnesses refused to answer, and their action in so doing was upheld on the ground that the information requested was a trade secret and that its disclosure was not essential to the proper maintenance of the complainants' suit.

[2] Vulcan Detinning Co. *v.* American Can Co., 67 Atl., 339 (N. J. Court of Errors and Appeals, 1907). Per Garrison, J.: "What I wish to point out is that the real gravamen of the complainant's bill, as amplified in the proofs, is not that the defendants are threatening to destroy the value of an absolute secret by imparting it to the public, but that the defendants, while keeping the secret of the process to themselves, are making a use of it that is inequitable as to the complainant. In fine, the main and immediate need of the complainant, as shown by the testimony, is to be protected from the inequitable competition to which it had been exposed by a breach of confidence. * * * I am not suggesting that the complainant is not entitled to an injunction enjoining publication, for I think that it is; but I am now saying that the main ground for relief disclosed by the complainant's case is the existence of inequitable competition arising from a breach of trust, and hence referable to general principles of equity, and not to those special doctrines by which unpatented secrets are protected. In the application of these general principles the secrecy with which a court of equity deals is not necessarily that absolute secrecy that inheres in discovery, but that qualified secrecy that arises from mutual understanding and that is required alike by good faith and by good morals."

[3] Heminway *v.* Heminway, 58 Conn., 443 (1890).

refuse to transfer shares of its stock to a purchaser who was a party to a conspiracy to boycott the business of the corporation and who desired to become a stockholder for the express purpose of discovering its source of supply.[1]

ENGLISH DECISIONS.

The English courts have for many years restrained the use or communication of trade secrets or confidential information, imparted to employees or associates in confidence or necessarily acquired by them in the course of employment, where to permit such use or disclosure would be a violation of an express or implied contract or would amount to a breach of trust.[2] Persons acquiring a knowledge of such secrets, with notice of their confidential nature, have, also, been enjoined from using or disclosing them.

It was early held by the English courts that the use or betrayal of secret formulas or processes by faithless employees could be restrained by a court of equity. In 1820 Lord Chancellor Eldon granted an injunction restraining a former employee of a manufacturer of proprietary remedies from using in a rival business, or from disclosing to others, recipes surreptitiously copied from the books of his employer.[3] In a leading English case on this subject, decided in 1851, one of the partners in a company, engaged in the manufacture of a medicinal preparation according to a secret formula, disclosed the formula to his son in violation of the terms of his partnership con-

[1] Funck *v.* Farmers' Elevator Co. et al., 142 Iowa, 621 (1909). The following from the Report of the Commissioner of Corporations on the Petroleum Industry, Pt. I (p. 153), indicates that this method of acquiring a competitor's secrets is not unusual:

"In the case of the United States Pipe Line Co. the Standard obtained a minority of the stock and has been able to secure representation upon the directorate, so as to be familiar with the business secrets of its competitor."

See also Carter *v.* Producers' Oil Co. (Ltd.), 182 Pa. St., 551 (1897), and U. S. *v.* Standard Oil Co. of N. J. (C. C., E. D., Mo.); Brief of facts and argument for petitioner, Vol. I, pp. 231–235.

And see brief for the United States in United States *v.* American Tobacco Co. et al., where it was urged that "one use of 'supply' companies was to obtain through them information about the business of competitors. The Mengel Box Co., for example, was required to report monthly the number of boxes which it sold to independents. (R. II, 663.)" (On appeal from the Circuit Court of the United States for the Southern District of New York, p. 217.) See also Monarch Tobacco Works *v.* American Tobacco Co. et al., 165 Fed., 774 (C. C., 1908).

[2] Lord Justice Turner in Morison *v.* Moat, 9 Hare, 241, 255 (1851), said: "That the court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract, and in others, again, it has been treated as founded upon trust or confidence, meaning, as I conceive, that the court fastens the obligation on the conscience of the party and enforces it against him in the same manner as it enforces against a party to whom a benefit is given the obligation of performing a promise on the faith of which the benefit has been conferred; but upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it."

[3] Yovatt *v.* Winyard, 1 Jacob & Walker, 394 (1820).

tract, with which the latter was familiar. The court held that the formula had been revealed in breach of trust and of contract, and granted an injunction restraining the party to whom it had been disclosed from selling or compounding any medicine according to the secret recipe, and from in any manner using the secret or any part thereof.[1] Similarly where a manufacturer of disinfectants sold his business and covenanted not to disclose the secret process, nor engage in the same business for 14 years, the contract was held enforcible.[2] So, also, a contract whereby an employee agreed not to use or disclose any of his employer's secret formulas, processes, or machinery for making typewriter ribbons and carbon paper, was held valid and the employee enjoined from violating it.[3] In like manner, where an employee of a company was informed that its process of manufacture was secret, but on acquiring an imperfect knowledge of it entered the service of a competitor and was attempting to use the process and to secure the parts of it with which he was not familiar from the original inventor, it was held that an injunction should issue to prevent him from using the process.[4]

The same legal principles under which secret formulas or processes are protected have been invoked by the English courts to prevent the unfair use by competitors of other trade secrets or confidential information. Thus a company engaged in the manufacture of fire engines has been granted an injunction restraining a former employee and his new master from using a table of dimensions of its engines which the employee had made and carried away with him.[5] But where a telegraph company in London made arrangements with individuals in Australia, described as agents of the company, for the transmission of its messages, using certain code words to indicate the names of firms or persons in Australia to whom messages were frequently sent, it was held that the Australian agents, on starting a similar business, could make use of this code, the property in it, if there was any, being in the telegraph company's patrons, not in the company.[6] On the other hand, it has been held that the publisher of a trade directory, consisting principally of classified advertisements, could restrain former employees from using for the benefit of a rival company blocks, or cuts, and other materials made up while in

[1] Morison *v.* Moat, 9 Hare, 241 (1851).

[2] Hagg *v.* Darley, 47 L. J. Ch., 567 (1878).

[3] Caribonum Co. *v.* Le Couch, 109 Law Times Reps., 385 (1913), s. c., ib., 587. See also Rylands *v.* Ashley's Patent Bottle Co., 7 R. P. C., 175 (Ct. of Appeal, 1890).

[4] Amber Size & Chemical Co. *v.* Menzel, L. R. (1913), 2 Ch., 239. See also Liquid Veneer Co. *v.* Scott et al., 29 R. P. C., 639 (Ch. Div., 1912); Litholite, Ltd., *v.* Travis and Insulators, Ltd., 30 R. P. C., 532 (Ch. Div., 1913).

[5] Merryweather & Sons *v.* Moore, 61 L. J. Ch., 505 (1892).

[6] Reuter's Tel. Co. *v.* Byron, 43 L. J. Ch. (N. S.), 661 (1874). See also Reddaway *v.* Flynn et al., 30 R. P. C., 16 (1912).

his employ and for his use.[1] And where the Queen and Prince Albert made a number of etchings which they had not published, and others surreptitously secured them and had impressions made for their own private use, it was held that they should be enjoined from making engravings or copies of the etchings or from publishing or selling a descriptive catalogue of them.[2] Likewise, where an engraver was employed to make copies of a drawing and secretly made copies for himself, which he sold in competition with the owners, it was held that the latter were entitled to an injunction to prevent the sale of the copies thus secretly made, and to damages.[3]

The English courts, also, hold that lists of customers or of agents are confidential, and that originals of such lists or copies thereof taken away by employees can not be used either by them or by subsequent employers. For example, where the owner of a game farm employed a manager under a contract that he would treat everything in connection with the business as confidential, it was held that the manager must return a list of his employer's customers which he took with him on setting up in business for himself, and must pay the damages resulting from his use of the list.[4] And where an employee of a dealer in mineral waters contracted not to disclose any of the trusts, secrets, or dealings of his employer, but on leaving took with him a memorandum book containing the names and addresses of his employer's customers, the court commanded the return of the memorandum book and enjoined both the employee and his new master, who had notice of the contract, from using the same.[5] Similarly a process server was granted an injunction restraining a former employee from making use of any copies or extracts from his register of agents, or index, or any memoranda made by the employee while in his service relating to any persons named on his register or index.[6] And in a Canadian case it was held that lists of customers, and prospective customers, prepared by an agent for the territory assigned him, as well as a similar list for other territory, which he had purchased from another agent, were the property of the employer; but that a list of probable purchasers in all of Canada,

[1] Lamb *v.* Evans, 62 L. J. Ch., 404 (Court of Appeal, 1892). Per Kay, L. J.: "Even if it were established that the plaintiff could not prevent anybody else in the world from publishing or using these materials which the plaintiff wishes to prevent the defendants from using, that would be no answer to the plaintiff's claim for an injunction against the defendants, because the defendants, from the position in which they were, are put under a duty toward the plaintiff not to make this use of the materials."

[2] Prince Albert *v.* Strange et al., 18 L. J. Ch. (N. S.), 120 (1849).

[3] Tuck & Sons *v.* Priester, L. R. (1887), 19 Q. B. Div., 629.

[4] Robb *v.* Green, L. R. (1895), 2 Q. B. Div., 1; s. c., ib., 315.

[5] Summers *v.* Boyce et al., 97 Law Times Reps., 505 (Ch. Div., 1908).

[6] Louis *v.* Smellie, 73 Law Times Reps., 226 (Ct. of Appeal, 1895). See also Measures Bros. *v.* Measures, L. R. (1910), 1 Ch., 336.

compiled by the agent, was his own property in which his employer had no rights.[1]

A Canadian court has, also, held that an employers rate of profit and his cost of production are confidential information for the disclosure of which he may recover damages. In this case former employees of a manufacturer of what was known as the "Loose-leaf Business System of Book and Account Keeping," who were promoting a competing company disclosed to others the company's rate of profit and cost of production, and the court directed an inquiry into the amount of damage resulting from the disclosure as well as from the use of patterns of sheets and records or dimensions of blank sheets, taken from the employer's place of business.[2]

Section 6. Appropriation of values created by competitors' expenditures.

A peculiarly subtle form of competition is disclosed in the appropriation in diverse ways of values created by a competitor's expenditures. Such a method of obtaining a rival's patronage and at the same time profiting by his pioneering in a particular business has been attempted, among other ways, by surreptitiously or openly taking information which another has collected for sale at large expense, and disposing of it in competition with the owner; by duplicating and selling another's articles, where, without the use of the original, a competing article could not be had at all, or could be produced only at great expense; by filling and selling a competitor's receptacles without entirely obliterating his name and that of his product and without any express notice to the purchaser that the receptacle did not contain the same article with which it was originally filled. The cases of this description are apparently limited in number and, while they show a tendency on the part of the courts to prevent one from dishonestly acquiring the benefit of another's investments and labor, the limits of the doctrine do not appear to be as yet well defined.

AMERICAN DECISIONS.

An illustration of the principle is found in a decision of the Supreme Court of the United States in 1905 where it was held that the Chicago Board of Trade, which permitted certain telegraph companies to have its quotations for transmission to parties approved by it, could enjoin a company, which secured the quotations in some unknown manner, from distributing them to others. In this case it was held that the exchange did not lose its property right in the

[1] Martin *v.* Brown, 14 Western Law Reporter, 237 (K. B., Manitoba, 1910).

[2] Copeland-Chatterson Co. *v.* Business Systems (Ltd.), 8 Ont. W. R., 888 (1906); s. c., 10 Ont. W. R., 819 (1907).

quotations by communicating them to the telegraph companies.[1] In a subsequent case the same court held that quotations on the New York Cotton Exchange were the property of the exchange, and that it could control their distribution in such a way as it saw fit.[2] Similarly where a telegraph company, at considerable expense, collected news relating to current prices of securities, race track, baseball, and other events, it was held that the company's property in the news, which consisted largely in making it available in the shortest possible time after the happening of the events reported, was entitled to protection, and that this company could enjoin another from taking the news from its tape in the office of its patrons and delivering it with only a few moments loss of time to its own customers.[3] And a company which collected advance information respecting the proposed construction of buildings, sewers, waterworks, and other public works, which it sold to subscribers under contract that it should be held in strict confidence, was granted an injunction restraining another from procuring the information from its subscribers and selling it in competition with it.[4] The same principle appears to have been applied to entirely different facts in Fonotipia Co. (Ltd.) et al. *v.* Bradley.[5] There the Fonotipia Co. manufactured records for use on graphophones. The Continental Record Co. manufactured records from a matrix produced by them from the commercial records of the Fonotipia Co., and sold them in competition with it, advertising them at greatly reduced rates and as reproductions of the voices of artists under contract with the Fonotipia Co., asserting also that the records were identical with the originals. The Fonotipia Co. was granted an injunction restraining the rival company from selling copies of its records, the court holding it to be a wrongful appropriation of the property of the Fonotipia Co. Similarly, where a company manufactured illuminating gas called Prest-O-Lite for use on automobiles, and sold it in containers of peculiar construction, and had established depots in all the larger towns of the United States, where an empty container could be immediately exchanged for a filled one, it was held that the company could restrain a dealer from having said containers filled with a competing gas and disposing of them in competition with it without first obliterating therefrom the company's name, the word

[1] Board of Trade *v.* Christie Grain & Stock Company, 198 U. S., 236 (1905).

[2] Hunt *v.* New York Cotton Exchange, 205 U. S., 322 (1907).

[3] National Telegraph News Co. *v.* Western Union Telegraph Co., 119 Fed., 294 (C. C. A., 1902). See also Board of Trade *v.* Hadden-Krull Co. et al., 109 Fed., 705 (C. C., 1901); Illinois Commission Co. et al. *v.* Cleveland Telegraph Co. et al., 119 Fed., 301 (C. C. A., 1902); Board of Trade *v.* Cella Commission Co. et al., 145 Fed., 28 (C. C. A., 1906); Kiernan *v.* The Manhattan Quotation Telegraph Co., 50 How. Prac., 194 (N. Y. Sup. Ct., 1876); Board of Trade *v.* Tucker, 221 Fed., 305 (C. C. A., 1915).

[4] Dodge Co. *v.* Construction Information Co. et al., 183 Mass., 62 (1903).

[5] 171 Fed., 951 (C. C., 1909).

"Prest-O-Lite" and any other marking identifying the container with the manufacturer of Prest-O-Lite.[1] So also a company which had incurred the initial expense of a series of advertisements by publishing a picture of a young woman with the words "Wink at the grocer and see what you will get. K. T. C.," for the purpose of exciting curiosity and attracting attention to subsequent advertisements that would disclose the character of the goods advertised and the name of the manufacturer, was granted a preliminary injunction restraining another from publishing advertisements in such form as to create the belief that its goods were referred to in the advertisement first issued.[2] The case was not carried to a final hearing. On the other hand, the St. Louis court of appeals held that a laundry company which had inaugurated a similar series of advertisements by having an advertising company publish on signboards and cards the word "Stopurkicken," could not recover from an envelope company which, with knowledge of the purpose for which public attention had been directed to the word, itself printed and distributed a large number of cards bearing that word, followed by the name of the envelope company.[3]

ENGLISH DECISIONS.

The decisions in some of the above cases are in accord with opinions of the English courts. Thus, where a telegraph company purchased the sole privilege of obtaining quotations from the floor of the London Stock Exchange and sold the information to subscribers on condition that they would not sell or communicate it to nonsubscribers, and also later printed it on sheets for the use of subscribers, it was held that the company could enjoin others from obtaining the quotations from its tapes or sheets and from inducing any of its subscribers to supply the information in violation of their contract.[4] In like manner, a telegraph company which collected information regarding the results of horse races and sold it to hotels, clubs, and news rooms, was granted an injunction restraining a rival company from surreptitiously obtaining or copying this news from its sheets, tapes, or other documents and from communicating the news so obtained.[5]

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[1] Prest-O-Lite Co. *v.* Davis et al., 209 Fed., 917 (D. C., 1913). Cf. Victor Talking Mach. Co. *v.* Armstrong, 132 Fed., 711 (C. C., 1904).

[2] Case not reported.

[3] Westminister Laundry Co. *v.* Hesse Envelope Co., 156 S. W., 767 (St. Louis court of appeals, 1913).

[4] Exchange Telegraph Co. *v.* Gregory & Co., L. R. (1895), 1 Q. B., 147.

[5] Exchange Telegraph Co. *v.* Central News Co. et al., L. R. (1897), 2 Ch., 48. See also Exchange Tel. Co. *v.* Howard et al., 22 Times Law Reps., 375 (1906).

Section 7. Defamation of competitors and disparagement of competitors' goods.

The reported cases show that it is not unusual for one competitor to attempt to injure another by means of libel or slander, or by disparaging his goods, and that this conduct has frequently interfered with the business of a rival who has been attacked. As shown below, such practices, in connection with other acts of "unfair competition," have been enjoined by the Federal courts in enforcing the Sherman law.[1] Other courts, when declaring such methods actionable, have referred to them in substantially similar terms. Thus Vice Chancellor Malins described a proceeding as one "to prevent unfair trading, to prevent the issuing of a falsehood to the detriment of another," and in referring to the untrue statements complained of, said: "Is that fair trading?" and "That is unfair dealing."[2] In another case, Lord Justice Cotton expressed the opinion that a circular giving the impression that the business of a competitor was about to fail was not justified as an act of "fair competition," and Lord Justice Bowen reached the same conclusion.[3] Likewise Brett, J., referring to an alleged libel, left it to the jury to determine whether the defendant had not "gone beyond fair fighting and done that which brings him within the law."[4] Similarly, in this country a Federal court expressed the opinion that a certain advertisement was not justified as "proper competition,"[5] and the Supreme Court of Georgia, while conceding that it is not always easy to draw the line between what may be considered "legitimate competition" and a libelous publication, came to the conclusion that an advertisement complained of exceeded the bounds of "legitimate competition."[6]

AMERICAN DECISIONS.

PERSONAL DEFAMATION.—Words imputing the commission of a crime are actionable in themselves without proof of special damage. Thus, in a Federal court an article charging a competitor with being a trust was held actionable, this being an offense punishable both by the laws of the United States and the State of Iowa, where both parties were engaged in business.[7] It has likewise been held actionable to charge an importer with attempting to evade and

[1] U. S. *v.* Central-West Publishing Co. et al., p. 492.

[2] Thorley's Cattle Food Co. *v.* Massam, L. R. (1877), 6 Ch. Div., 574, 587, 588. And see L. R. (1880), 14 Ch. Div., 763, 780.

[3] Helmore *v.* Smith, L. R. (1886), 35 Ch. Div., 449, 454, 456 (Ct. of Appeal).

[4] Latimer *v.* Western Morning News Co., 25 Law Times Reps., 44, 46 (1871).

[5] Continental Insurance Co. *v.* Board of Fire Underwriters of the Pacific et al., 67 Fed., 310, 323 (C. C., 1895).

[6] Holmes *v.* Clisby, 118 Ga., 820, 824 (1903).

[7] Sternberg Manufacturing Co. *v.* Miller, Du Brul & Peters Manufacturing Co., 170 Fed., 298 (C. C. A., 1909). See also American Malting Co. *v.* Keitel, 217 Fed., 672 (D. C., 1914).

defraud the revenue laws by making fraudulent invoices of books imported from Canada.[1]

To impute a want of integrity, capacity, or skill in the conduct of a business is also actionable without proof of special damage. It was so held where a grocer distributed circulars in which it was stated "that an unscrupulous grocer of the same name, in the immediate vicinity or neighborhood advertises 'Davey's teas and coffees,' with a view to deceive the public, and may sell an inferior article;"[2] and where an art dealer informed one who had purchased a painting from a competitor that he had been "roped in," and that the painting was not an original, but a copy, the court held that the words were actionable without proof of special damage, pointing out that the plaintiff had been in business seven years, and might, therefore, be assumed to know an original.[3] The same rule was applied where a company publishing a city directory issued "a warning" to the effect that "certain unscrupulous parties, in making a pretended canvass of the city for a directory, persist in falsely representing" that the defendant company did "not intend to publish a directory"; that "these untruthful adventurers" knew full well that it was possible for them to secure business only on the basis of "misrepresentation"; that the people of the city had experience with "wandering fakirs, whose only capital" was "glowing promises and only object to capture their money"; and that it was "folly to pay money to irresponsible directory schemers" when they could be sure of a reliable work at the same or less cost.[4] On the other hand, where the plaintiff was not referred to by name, it was held not actionable for a competitor to issue a catalogue containing language such as "There is no intent to mislead, exaggerate, or appeal to the selfish desire for gain through the imaginary misfortunes of others" and "We do not advertise books at the price of paper and printing because it would not be true."[5] But it has been held actionable to refer to

[1] Worthington v. Houghton et al., 109 Mass., 481 (1872). See also Young et al. v. Kuhn, 71 Tex., 645 (1888); Mowry v. Raabe et al., 89 Cal., 606 (1891); and Blumhardt v. Rohr, 70 Md., 328 (1889), involving charges that the plaintiffs, who were butchers, sold diseased or unwholesome meat, this, according to the latter case, being punishable at common law; and see Marino v. Di Marco, 41 App. D. C., 76 (1913), where it was held actionable to say of a fruit dealer that he sells "rotten goods," especially in view of the food and drugs act; and Dorn & McGinty et al. v. Cooper, 117 N. W., 1, 127 N. W., 661 (Iowa Sup. Ct., 1910), where the plaintiffs were charged with being interested in a pool to control the local hog market.

[2] Davey v. Davey, 50 N. Y. Supp., 161 (Sup. Ct., 1898).

[3] Freisinger v. Moore, 65 N. J. Law, 286 (1900).

[4] Robinson v. Eau Claire Book & Stationery Co. et al., 85 N. W., 983 (Wis. Sup. Ct., 1901).

[5] Clarkson v. The Book Supply Co. et al., 170 Ill. App., 86 (1912). Per McSurely, J.: "We fail to see how the words complained of can possibly be stretched so as to be held defamatory of the plaintiff. To do so would subject any merchant advertising articles for sale as 'genuine' or 'well made' to an action for libel by other merchants, on the ground that the advertiser intended to charge them with selling articles which were imitations and poorly made." Cf. Hubbuck & Sons (Ltd.) v. Wilkinson, Heywood & Clark (Ltd.), p. 381.

a rival trade journal as a "fake,"[1] to charge a rival press association with stealing news by means of tapped wires,[2] and to charge a publisher with having sold the support and advocacy of his newspaper to certain corporations for a large sum of money.[3] Likewise where a retail druggist advertised the goods of a manufacturer at reduced prices, it was held actionable for the latter to reproduce this advertisement, followed, in large type, with the words "The above ad is a fraud."[4] A cause of action was also disclosed where it was alleged that a corporation published an advertisement to the effect that the plaintiff, its former agent, had not been connected with that company since a specified date, and that any contracts made by him for the company would be void, the purpose being to injure the plaintiff in his business by making the public believe he was undertaking to act as the agent of the defendant when in fact he was not so doing.[5]

As noted above, it is actionable to charge a tradesman with being unskillful in the conduct of his business. Thus, where the agent of a corporation manufacturing ice machines wrote a letter to a firm which had accepted the bid of a rival manufacturer, stating that the latter was a "secondhand dealer," that it did inferior work, and used inferior material, that it ran a "scab establishment," and did not have a "mechanic" in the whole establishment, "including the head of the concern," it was held that the words were actionable without proof of special damage.[6] And in Louisiana it has been held actionable for a merchant to place in his show window a card bearing the words "Don't be misled. This store and window has no connection with the would-be auction next door."[7]

To impute dishonesty to a trader is likewise actionable. Thus, where a commission merchant called attention to the fact that his former partner was a minor and not legally responsible for his contracts, and observed that "a word to the wise is sufficient," it was held that the words were libelous for the reason that they conveyed

[1] Midland Publishing Co. *v.* Implement Trade Journal Co. et al., 108 Mo. App., 223 (1904).

[2] Union Associated Press *v.* Heath, 63 N. Y. Supp., 96 (Sup. Ct., App. Div., 1900).

[3] Fitch *v.* De Young, 66 Cal., 339 (1885). See also Coleman *v.* Southwick, and Marais *v.* The Volksstem Co., p. 380.

[4] The Washington Post and Durham Duplex Razor Co. *v.* O'Donnell, 43 App. D. C., 215 (1915).

[5] Behre *v.* National Cash Register Co., 100 Ga., 213 (1897). See also Warner *v.* Clark, 45 La. Ann., 863 (1893), and Miller *v.* Green, 33 Nova Scotia, 517 (1900).

[6] Pennsylvania Iron Works Co. *v.* Henry Voght Machine Co., 96 S. W., 551 (Ky. Ct. App., 1906). And see Green *v.* Davies, 83 N. Y. App. Div., 216 (1903), where it was held actionable to conspire to injure a competitor by causing his customers to believe that he was insane and incapable of attending to his business; and Southwick *v.* Stevens, 10 Johns., 443 (1813), where the editor of the Albany Register recovered damages in an action against the editor of the Ontario Messenger, based on an article appearing in the latter paper to the effect that the plaintiff was insane and had recently been restrained by his friends.

[7] Gilly *v.* Hirsh, 122 La., 966 (1909).

the imputation of dishonesty in connection with the plaintiff's business, that he was wanting in honor and integrity, and that those who should deal with him would suffer loss.[1] Similarly, it was held actionable for a milk dealer to write to a shipper, advising him to "look out" for the plaintiff, a rival dealer, "unless you have surety for your goods, as he does not pay any of his shippers anything."[2]

It is also actionable to impeach the credit of traders by imputing bankruptcy or even financial embarrassment. For example, in Florida a merchant recovered damages from a competitor who falsely stated that he had failed and had gone into bankruptcy.[3] And where in a newspaper it was stated in substance that a rival paper had been maintaining for some time a precarious existence; that it was no longer able to meet its financial obligations; that it was tottering, bankrupt, and about to pass out of existence, it was held that the article was libelous per se.[4]

DISPARAGEMENT OF GOODS AS AN INDIRECT ATTACK ON A MANUFACTURER OR DEALER.—Although statements which merely disparage the goods of a tradesman or manufacturer are not actionable without proof of special damage, those which also impeach the character or reputation of the plaintiff in his business are actionable per se. Accordingly, it has been held actionable to charge a competitor with selling a spurious article under labels and wrappers which he had caused to be counterfeited,[5] or to charge a butcher with selling Chinese pork and lard which contained the seeds of disease and spread pestilence and death,[6] or to make false statements concerning the pedigree of a breeding horse which had been represented by the owners to be imported and registered.[7] So where a retailer advertised a certain brand of shoes as perfect and undamaged stock, and at reduced prices, it was held actionable, although no special damage was averred, for the manufacturers to advertise that their damaged shoes were sold to certain dealers under an agreement that they should be sold as imperfect goods, and that those who bought their shoes of others than their designated agents would have only themselves to blame for any

[1] Hays *v.* Mather, 15 Ill. App., 30 (1884).

[2] Brown *v.* Vannaman, 85 Wis., 451 (1893).

[3] Wolkowsky *v.* Garfunkel, 65 Fla., 10 (1913).

[4] Bee Publishing Co. *v.* World Publishing Co., 82 N. W., 28 (Nebr. Sup. Ct., 1900). See also Newell *v.* How, 31 Minn., 235 (1883); Simons *v.* Burnham, 102 Mich., 189 (1894); and Hynds *v.* Fourteenth Street Store, 144 N. Y. Supp., 1030 (1913).

[5] Steketee *v.* Kimm et al., 48 Mich., 322 (1882). See also Landon et al. *v.* Watkins, 61 Minn., 137 (1895); Burr's Damascus Tool Works *v.* Peninsular Tool Mfg. Co., 142 Mich., 417 (1905); New Iberia Extract Co. *v.* E. McIlhenny's Son et al., 61 So., 131 (La., 1912).

[6] Mowry *v.* Raabe et al., 89 Cal., 606 (1891).

[7] Henkle et al. *v.* Schaub, 54 N. W., 293 (Mich. Sup. Ct., 1893). Per Long, J.: "It is apparent * * * that the action is based, not only upon the slander of the horse, but also upon the character, fame, and credit of the plaintiffs, who are the owners thereof, and engaged in the business and calling of keeping the horse for hire, gain and reward." See also Wier *v.* Allen, 51 N. H., 177 (1871).

disappointment or loss that might ensue.[1] On the other hand, in a case in which the facts were very similar, the Supreme Court of Massachusetts reached a different conclusion. There, it appeared that a representative of a manufacturer sold a tradesman a quantity of stockings, stating that they were first-quality navy blue, and that the dealer subsequently advertised them for sale at 12½ cents a pair. The manufacturer thereupon published an advertisement containing the following:

Caution.—An opinion of Shaw Knit hosiery should not be formed from the navy-blue stockings advertised as of first quality by Messrs. S. W. Boynton & Co. at 12½ cents, since we sold that firm, at less than 10 cents a pair, some lots which were damaged in the dye-house.

Although the plaintiff submitted evidence tending to show that the stockings were not damaged in any respect, but were of first quality, the trial court instructed the jury to return a verdict for the defendant. This ruling was affirmed on appeal.[2]

In another case it appeared that the plaintiff and defendants were the only persons handling stoves in a certain town, and that the defendants published an advertisement purporting to be the statement of a satisfied customer to the effect that he had purchased of a certain hardware dealer, not the defendants, a stove which was represented as new and one of the best on the market, but that after only three years of careful usage he gave it to a drayman for hauling it away; and further stated that it may be that the American people like to be humbugged, and that some dealers still think so, but the great majority prefer a square deal. The court held that the article was libelous and that the contention that the defendants' interest as competing dealers refuted the presumption of malice and made the article in a sense privileged was without merit. Although it was urged that it was merely a disparaging criticism of the goods, the court

[1] Holmes *v.* Clisby, 118 Ga., 820, 824 (1903). Per Cobb, J.: "Such a publication, in our opinion, exceeds the bounds of legitimate competition. It is right and proper for tradesmen to puff their own goods to the disparagement of those of others, but they must not allow their zeal to betray them into an attack upon the personal reputation of their competitors for honesty and integrity."

[2] Boynton *v.* Shaw Stocking Co., 15 N. E., 507, 510 (1888). Per Allen, J.: "No doubt a case might be imagined where, from peculiar circumstances, as, for example, from the nature of the article offered for sale, or from the long continued habit of selling goods of a different character or quality from that represented, it would be a natural inference from a charge otherwise like that which is the subject of this action that the party was practicing fraud or imposition, or was guilty of trickery or meanness. In the present case, such an inference does not naturally arise, and the object of the defendant's advertisement, judging from its language, appears to have been rather to uphold and maintain the character of their goods, than to attack the plaintiff's character."

The Supreme Court of Georgia, in Holmes *v.* Clisby, above, referred to this decision and Boynton *v.* Remington, 3 Allen, 397, and, while admitting that they were very closely in point, declined to follow them, saying: "Notwithstanding the very high respect which we entertain for the distinguished court which rendered those decisions, we are unwilling to allow them to influence us to make a decision which in our judgment would be unsound."

was of the opinion that the article clearly intended to charge the dealer of being guilty of deception and unfair dealing.[1]

DISPARAGEMENT OF COMPETITORS' GOODS.—Actions based on statements merely in disparagement of a trader's goods have been brought less frequently in this country than in England, and they have generally been unsuccessful. This appears to be due partly to the fact that the pleadings were drawn on the theory that the disparaging language reflected also on the conduct of the plaintiff in the way of his trade, and was therefore actionable per se.

One of the earliest American cases of this description was brought in New York in 1830 by a watchmaker, who complained that a rival had said that the plaintiff's watches were not good, but were "bad" and "inferior." The court gave judgment for the defendant, observing that the words were not actionable in themselves and that special damage was not alleged.[2] Likewise in Maryland, where the manufacturer of a dentifrice brought an action against a competitor who, it was alleged, had falsely stated that the plaintiff's article was nothing but grit, was very harmful to the gums, and would take the enamel off the teeth, it was held that in the absence of an averment of special damage the plaintiff could not recover.[3]

The same rule is applied in the Federal courts. Thus, where the defendants, in referring to a covering manufactured by a competitor, used the words, "You recommend something which the experience of all practical men demonstrates is a fraud," and further, "that it is a short-lived affair; that it warps, twists, chars, and becomes generally disintegrated, useless, and dangerous as a nonheat conducting cover to be applied to steam pipes," the court gave judgment for the defendant, being of opinion that the word "fraud" related to the covering and not to the plaintiff, and that the language amounted merely to the expression of an unfavorable opinion of the goods of a competitor.[4] So, in the absence of an allegation of special damage,

[1] Ramharter *v.* Olson et al., 128 N. W., 806 (S. Dak. Sup. Ct., 1910).

[2] Tobias *v.* Harland, 4 Wend., 537, 543 (N. Y., 1830). Per Marcy, J.: "It appears to me, that when the words are spoken, not of the trader or manufacturer, but of the quality of the articles he makes or deals in, to render them actionable, *per se*, they must import that the plaintiff is guilty of deceit or malpractice in the making or vending of them. The words used by the defendant here do not import such charge, nor do they amount to a charge of the want of skill. They do not assert that the defendant could not make or did not deal in good watches, or that he practiced any deceit in making them by which purchasers were imposed upon.

"The principle on which this action must be sustained, if it be sustainable, would make a new class of words actionable; and when applied, as it would be, to the business communications of every description of citizens, its practical effects would, in my judgment, be alarming."

[3] Hopkins Chemical Co. *v.* Read Drug & Chemical Co. of Baltimore City, 92 Atl., 478 (Md. Ct. of App., 1914).

[4] Nonpareil Cork Manufacturing Co. *v.* Keasbey & Mattison Co. et al., 108 Fed., 721, 723 (C. C., 1901). Per Dallas, Circuit Judge: "* * * Such expressions are not uncommon among rivals in trade, and their correctness in each instance is for determination by those whose custom is sought, and not by the courts."

it has been held not actionable to state that safes of a certain make and type are "very cheaply constructed" and "easily burglarized."[1]

Owing to the absence of decisions on the merits in cases of this description, it is impossible to determine the extent to which a manufacturer or dealer in this country may disparage the goods of a competitor without rendering himself liable. This branch of the law, however, has been developed to some extent in England, as will appear hereafter.[2]

LIBEL AND SLANDER NOT ENJOINED.—It appears to be a settled doctrine in this country that the courts will not restrain the publication of a libel, as such, however great the injury to property may be. Thus, the United States Supreme Court directed the dismissal of a bill in which it was alleged that the defendants had combined for the purpose of destroying the plaintiff's business "by publications in the newspapers" and in various other ways. Mr. Justice Field observed that the plaintiff had a full remedy in the courts of law, and that if the publications were false and injurious he could prosecute the publishers for libel.[3] Likewise, a Federal circuit court declined to restrain a light and power company from making statements to the effect that a certain competitor was insolvent, in great financial straits, or on the verge of bankruptcy, that it would very soon be out of business or in the hands of a receiver, or that it would not be able long to furnish electricity to its customers;[4] and in another case refused to restrain the editor of a commercial newspaper from publishing articles supporting certain action taken by a retail merchants' association against mail-order houses.[5] Likewise, where the manufacturer of Everett pianos alleged that a dealer kept at his place of business an untuned instrument which he falsely represented to be a new Everett piano, just received from the factory, the court declined to grant an injunction, being of opinion that the bill stated nothing more than a trade libel and consequently not a case for the interposition of a court of equity.[6] In an early case in New York the court refused to restrain a pill manufacturer from publishing a pamphlet unquestionably intended as a gross libel upon a rival

[1] Victor Safe & Lock Co. *v.* Deright, 147 Fed., 211 (C. C. A., 1906). See also Swan *v.* Tappan, 5 Cush., 104 (Mass., 1849); Dooling *v.* Budget Publishing Co., 144 Mass., 258 (1887); Wilson *v.* Dubois, 35 Minn., 471 (1886); Dust Sprayer Manufacturing Co. *v.* Western Fruit Grower, 126 Mo. App., 139 (1907); Kennedy *v.* Press Publishing Co., 41 Hun, 422 (N. Y., 1886); Bosi *v.* New York Herald Co., 68 N. Y. Supp., 898 (1901); Le Massena *v.* Storm, 62 N. Y. App. Div., 150 (1901); Marlin Fire Arms Co. *v.* Shields, 171 N. Y., 384 (1902); and West Va. Transportation Co. *v.* Standard Oil Co. et al., 50 W. Va., 611, 622 (1902).

[2] See p. 382.

[3] Francis et al. *v.* Flinn, 118 U. S., 385 (1886).

[4] Citizens' Light, Heat & Power Co. *v.* Montgomery Light & Water Power Co., 171 Fed., 553 (C. C., 1909). See also American Malting Co. *v.* Keitel, 217 Fed., 672 (D. C., 1914).

[5] Montgomery Ward & Co. *v.* South Dakota Retail Merchants & Hardware Dealers' Association et al., 150 Fed., 413 (C. C., 1907).

[6] Everett Piano Co. *v.* Maus., 200 Fed., 718 (C. C. A., 1912).

manufacturer.[1] And in Pennsylvania, where it was alleged that an agent and collector formerly employed by the complainant, an insurance company, entered the service of a competitor and falsely informed the members of the complainant association that it was going out of the sick-benefit branch of its business and would pay no more sick benefits, the court refused an injunction, observing that so far as a cause of action had been stated it was one for slander or libel and cognizable at law.[2] So in Georgia the supreme court held that a sewing machine company was not entitled to an injunction to prevent a rival from publishing false statements to the effect that it, and not the complainant, had received a premium at a certain exhibition.[3] It is likewise the rule in Massachusetts that a court of equity will not restrain false representations as to the character and business standing of the plaintiff,[4] or as to the character or quality of his property or his title thereto,[5] if there is no breach of trust or contract involved.

ENGLISH AND COLONIAL DECISIONS.[6]

PERSONAL DEFAMATION.—In England as in this country false words disparaging another in the way of his trade, by imputing fraudulent or dishonorable conduct in business, are actionable without proof of special damage. Thus it has been held a libel to state that a certain newspaper of limited circulation had reprinted columns of old advertisements from other newspapers to inveigle manufacturers into

[1] Brandreth *v.* Lance, 8 Paige, 23 (1839). See also Mauger *v.* Dick, 55 How. Pr., 132 (1878), where it was said that "the jurisdiction of a court of equity does not extend to false representations as to the character or quality of the plaintiff's property, or to his title thereto, when it involves no breach of trust or contract, nor does it extend to cases of libel or slander." And see Marlin Fire Arms Co. *v.* Shields, 171 N. Y., 384 (1902), refusing to enjoin the proprietor of a magazine from publishing any article attacking, misrepresenting, or depreciating the plaintiff's rifle, although the plaintiff had no remedy at law because of his inability to prove special damage.

[2] Baltimore Life Insurance Co. *v.* Gleisner and The Commonwealth Beneficial Association, 202 Pa. St., 386 (1902). But see Continental Insurance Co. *v.* Board of Fire Underwriters of the Pacific et al., 67 Fed., 310, 323 (C. C., 1895), where McKenna, circuit judge, continued a restraining order prohibiting advertisements by a representative of certain insurance companies to the effect that he had authority to cancel the policies of certain competing companies when in fact he had no such authority. In answer to the claim that it was competitive retaliation, the court said: "But the advertisement exceeds proper competition, and advertises to the public that which is not true, to wit, that said Rucker & Co. had the right to cancel policies issued by plaintiff."

[3] Singer Manufacturing Co. *v.* Domestic Sewing Machine Co. et al., 49 Ga., 70, 74 (1873). Per McCay, J.: "If a wrong capable of redress before the courts at all, it comes more nearly within the definition of a libel or of slander concerning one's trade or business, than anything else. Equity, it must be remembered, will not enjoin every wrong. * * * Libel and slander, however illegal and outrageous, will not be enjoined."

[4] Raymond *v.* Russell et al., 143 Mass., 295 (1887).

[5] Boston Diatite Co. *v.* Florence Manufacturing Co. et al., 114 Mass., 69 (1873); Whitehead et al. *v.* Kitson, 119 Mass., 484 (1876).

[6] Acts passed in England in 1854 and 1873 conferred on the courts of common law and chancery power to grant injunctions in all personal actions of contract or tort with no limitation as to defamation.

paying for the spurious advertisements,[1] or printed articles stolen from the office of another newspaper,[2] or to state that a rival newspaper offers reduced rates to induce respectable advertisers to appear in the "usury and quack doctor page,"[3] or that a newspaper secured a contract for public printing "in a mean and contemptible manner" and by taking an "unfair advantage."[4] So it has been held libelous to charge that an optician is a licensed hawker and a quack in spectacle secrets.[5] So, where the court found that there was no substantial difference between the cattle food manufactured by the J. W. Thorley's Cattle Food Co. and that manufactured by the executors of Joseph Thorley, it was held that the latter had no right to advertise that they were alone possessed of the secret for compounding the food, or to issue circulars warning customers against a company which was seeking to "foist" upon the public an article which they pretend is the same as that manufactured by the late Joseph Thorley. An injunction was issued restraining the defendants from representing or suggesting that the cattle food manufactured and sold by the defendants is spurious and not genuine. Vice Chancellor Malins observed that "an untrue statement ought not to be made for the purpose of pushing a trade," and further stated that he did not entertain the least doubt that it is right and proper for the court to issue an injunction "where it sees that one trader is practicing an unfair mode of trading, representing that his article is the only genuine one, from which it follows that all others are spurious."[6] And where a manufacturer of cotton belting published a "caution" in a trade journal, stating in substance that unprincipled persons were imitating his belting, issuing misleading figures respecting the strength of their goods, and inducing buyers to take the imitation as the genuine belting, an injunction issued against both the publisher of the journal and the manufacturer, the latter being

[1] Latimer *v.* Western Morning News Co., 25 Law Times Reps., 44, 46 (1871). Per Brett, J.: "The question before you will be this, whether the proprietors of these two newspapers, after having done that which in law they were perfectly justified in doing, viz, to praise themselves as much as they possibly could in order to obtain the support and custom of the public—for I know of no law against self-laudation—whether one of them has not gone beyond fair fighting and done that which brings him within the law."

[2] Hartnett et al. *v.* Wilson et al., 1 Victoria Law Times, 45 (1856).

[3] Russell et al. *v.* Webster, 23 Weekly Reporter, 59 (1874).

[4] Waddell *v.* Roxburgh, 21 Session Cases (4th Series), 883 (1894).

[5] Keyzor et al. *v.* Newcomb, 1 F. & F., 559 (1859).

[6] Thorley's Cattle Food Co. *v.* Massam, L. R. (1880), 14 Ch. Div., 763, 782. Per James L. J.: "They had a right to warn the public that the company were not carrying on the business carried on by the defendants, and were not the successors of Joseph Thorley; but they did more than this—they went on to make allegations imputing to the company that they were foisting a fictitious article on the public."

Cf. Liebig's Extract of Meat Co. (Ltd.) *v.* Anderson, 55 Law Times Reps., 206 (1886), where the defendant was enjoined from issuing labels and advertisements containing the words "This is the only genuine." It was not suggested that the labels were defamatory and they were apparently regarded a mere trade libel. See also Hatchard *v.* Mege, L. R. (1887), 18 Q. B. D., 771.

also ordered to pay damages.[1] Similarly, where Richard Hayward & Sons distributed circulars stating in substance that Hayward & Co. in previous litigation had been "ordered" by the court not to represent themselves as the original firm of Richard Hayward & Sons, when in fact the action had been dismissed, and a voluntary undertaking had been entered into, it was held that the report was libelous as imputing fraudulent and dishonest conduct, and the court awarded nominal damages and an injunction.[2]

In Scotland an injunction was granted to restrain an insurance company from circulating handbills entitled "Scandalous revelations," stating that a rival company was conducting its business in a scandalous and improper manner, and had defrauded a woman policyholder and withheld money legally due under its policies.[3]

In Canada it has been held actionable for a watch manufacturer to charge that a rival deceived and defrauded the public by selling cheap Swiss watches as English, at twice or three times their true value, and to caution the public that certain unprincipled dealers sold worthless Swiss counterfeits as genuine American watches at far more than their value.[4] In another Canadian case it appeared that the defendant, who sold lightning rods, published a statement to the effect that a competitor charged from 37 to 42½ cents per foot whereas the defendant could furnish a better rod at from 7 to 10 cents per foot, and that he felt it to be an imposition practiced by the plaintiffs on the public when rods could be sold at such low prices. The statements were untrue, in that the prices charged by the plaintiffs included the cost of erection, while the sums charged by the defendant only included the price of the rod, although, as the jury found, they were intended to convey the impression that the cost of erection was also included. The jury found for the plaintiffs, and on appeal it was held that a cause of action had been disclosed.[5] It has also been held actionable to publish a "caution," warning those dealing with the plaintiff that his pumps are an infringement of the defendant's patent, and advising them to "beware of the fraud and save costs."[6]

Statements impeaching the credit of business rivals have also been condemned. Thus, a firm dealing in sewing machines secured an injunction against their former manager restraining him from stat-

[1] Kerr *v.* Gandy, 3 Times Law Reps., 75 (1886).

[2] Hayward & Co. *v.* Hayward & Sons, 34 Ch. D., 198 (1886). See Saxby *v.* Easterbrook and Hannaford, L. R. (1878), 3 C. P. D., 339.

[3] British Legal Life Assurance & Loan Co. (Ltd.) *v.* Pearl Life Assurance Co. (Ltd.), 14 Session Cases (4th Series), 818 (1887).

[4] Russell et al. *v.* Wilkes, 27 Upper Canada Q. B., 280 (1868).

[5] Ontario Copper Lightning Rod Co. *v.* Hewitt, 30 Ontario Common Pleas, 172 (1879). See also Sloman *v.* Chisholm, 22 Upper Canada Q. B., 20 (1862), and Cohen *v.* Bell, (1910) Transvaal Leader Law Reps., 331.

[6] Cousins *v.* Merrill, 16 Upper Canada C. P., 114 (1865).

ing to their customers that they were about to stop payment, or were in difficulties, or were insolvent, or from making other statements of like effect.[1] And where a business was being conducted by a receiver, a circular leading customers to believe that the business was in a failing state, or would shortly fail, was held libelous, and was punished as a contempt of court. In this case it was urged that the business when under the management of a receiver was no more entitled to protection from fair competition than the business carried on by the original firm. With respect to this, Bowen, L. J., said: "If the acts complained of merely amounted to such fair competition, the argument would be unanswerable. But when I examine the facts I come to a different conclusion." Likewise, Cotton, L. J., observed: "If it had been fair competition, that argument would have to be dealt with. But in my opinion this was not a case of fair competition. No fair competition would justify the act of the appellant in sending round a copy of the report in the Times, which, if taken alone, would lead the customers to think that the business was in a failing state or would shortly fail."[2]

Publications tending to expose competitors to public hatred, contempt, or ridicule are also actionable. Thus an English court granted an injunction, where it appeared that a firm, taking advantage of popular prejudice, caused the publication of a statement to the effect that the directorate of a rival company was composed of Germans, and that by purchasing its commodities the public would be assisting the enemies of Great Britain.[3]

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[1] Hermann Loog *v.* Bean, L. R. (1884), 26 Ch. Div., 306.

[2] Helmore *v.* Smith, L. R., 35 Ch. Div., 449, 454, 456 (1886).

[3] J. Lyons & Co. (Ltd.) *v.* Lipton (Ltd.), Law Journal, Sept. 26, 1914, p. 542; and see Berridge *v.* Billinghurst, ib., and Hambourg *v.* The London Mail (Ltd.), Law Journal, Oct. 31, 1914, p. 597.

See also Coleman *v.* Southwick, 9 Johns., 44, where the editor of the New York Evening Post, in 1812, recovered damages for a libel appearing in the Albany Register, the effect of which was to cause it to be believed, among other things, that the plaintiff was under the influence of an unprincipled devotion to Great Britain and promulgated treasonable sentiments.

See also Marais *v.* The Volksstem Co., 3 O. R., 66 (1896), where the following words which appeared in the Volksstem, under the heading "British intervention," were held by the high court of the South African Republic to constitute a libel:

"This is the actual state of affairs, which widely differs from the view of the Star, of Land en Volk, Cape Times, Argus, and other hired Rhodes's organs.

"Many of the colonial newspapers, among others the South African Telegraph and De Zuid Afrikaan, agree with our views; but what can we say of papers in the employ of Mr. Rhodes, which exist in this country, such as the Star, Advertiser, Land en Volk, which throw their weight against the true interests of their country in favor of a foreign power?"

It was alleged that as Rhodes was considered by the burghers to be an enemy of the State, the plaintiff's paper was brought into contempt, and he suffered serious and irremediable damage through the withdrawal of subscriptions.

In 1905 the United Flexible Metallic Tubing Co. brought an action against one Crowther, alleging that he had slandered their goods by stating that they were made in Germany and not in England. The defendant offered a perpetual undertaking, which was accepted. (Crowther *v.* United Flexible Metallic Tubing Co. (Ltd.), 22 R. P. C., 549, 551.)

DISPARAGEMENT OF GOODS AS AN INDIRECT ATTACK ON A MANUFACTURER OR DEALER.—As noted above, a statement disparaging the quality of goods may also be defamatory of the manufacturer or dealer, and actionable without proof of actual damage. Such a case was Salmon *v.* Isaac, where the plaintiff, a manure dealer, recovered damages from a competitor who distributed circulars stating in effect that the plaintiff sold a mixture of sand, sawdust, and other worthless materials as genuine Peruvian guano.[1] In another case it appeared that the Linotype Co. sent to the editors of two papers an article referring to certain Empire composing machines which had been installed in the office of the New York Evening Sun. The article concluded with the following paragraph:

> So short-lived, however, does this installation appear to have been that we learn the machines were discontinued on Wednesday, April 29, and now the Empire Co. is in receipt of notice to remove them altogether in the course of a few days. This will be a very serious blow for this machine.

It appeared that in consequence of trade-union rules, the presence of the machines made it necessary for the owners of the Sun to pay higher wages to their workmen, and that the machines were removed for this reason. The jury found, among other things, that the publication imputed that the plaintiffs were knowingly selling useless machines, and, although no special damage was alleged or proved, judgment was entered for the plaintiffs in the sum of £500. This judgment was affirmed in the court of appeal and the House of Lords.[2] On the other hand where a firm of paint manufacturers complained of a circular issued by a competitor which purported to be the report of a test of the latter's "Bell Brand Genuine White Zinc" and the plaintiff's Patent White Zinc, showing that the former was slightly better than the latter, it was held that the circular was not defamatory of the plaintiff company.[3]

So where the publishers of a newspaper brought an action against the Advertiser's Protection Society grounded on a published statement by the latter to the effect that the paper had a circulation

[1] Salmon *v.* Isaac, 20 Law Times Reps., 885 (1869).

[2] British Empire Typesetting Machine Co. and Empire Typesetting Machine Co. of New York *v.* Linotype Co., 14 Times Law Reps., 253 (Q. B. D., 1898); 79 Law Times Reps., 8 (1898); 81 Law Times Reps., 331 (1899).

[3] Hubbuck & Sons (Ltd.) *v.* Wilkinson, Heywood & Clark (Ltd.), L. R. (1899), 1 Q. B., 86, 92. Per Lindley, M. R.: "The fact that the defendants call their white zinc genuine and contrast it with the plaintiff's patent white zinc, which is not called genuine, is relied upon by the plaintiffs as showing that the circular is or may be fairly regarded as a defamatory libel on the plaintiffs, i. e., a libel on them in the way of their trade. But when the whole circular is looked at, and it is found that the defendants state that for all practical purposes the two contrasted paints are in every respect equal, it is impossible to treat the circular as anything more than a disparagement of the white zinc paint made and sold by the plaintiffs. No ingenuity can convert the circular into a defamatory libel on the plaintiff company." Cf. Clarkson *v.* The Book Supply Co., p. 371.

of about 5,000, when, it was alleged, the circulation amounted in fact to some 30,000, it was held that the statement was not libelous.[1] Likewise where an action was brought by certain contractors installing the "G. B." system of electric traction, grounded on certain statements imputing that the system was a failure both generally and with reference to a particular installation, it was held that the language was not susceptible of a defamatory meaning.[2] In another case it appeared that an asphalt company laid some roofing for a customer, and that the secretary of a rival company said to him: "You will regret ever using the rubbish put on by others as asphalt; it is only Trinidad rock, and not asphalt at all." The jury found that the words referred only to the article sold, and as it was also found that they were not used maliciously, and that there was no special damage, judgment was given for the defendant.[3]

DISPARAGEMENT OF COMPETITORS' GOODS.—Although it now appears to be a well-settled rule in England that it is actionable to publish false statements disparaging the goods manufactured by another, provided that they have resulted in actual damage, it would seem that this branch of the law is of comparatively recent origin. Thus, in 1862 Chief Justice Cockburn speaking for the court, observed that "not one of us recollects such an action in the course of his experience."[4] The first successful action of this description appears to have been brought in 1874. In this case a manufacturing company published a comparative analysis of four samples of artificial manure, accompanied with the statement that one of them, manufactured by the plaintiffs, appeared to contain "a considerable quantity of coprolites," and was "altogether an article of low quality, and ought to be the cheapest

[1] Publishers of the Observer (Ltd.) v. Advertiser's Protection Society (Ltd.) et al., London Times, Feb. 3 (p. 3), 1910. Per Darling, J.: "The action was based on two grounds, first, on that of libel, secondly, it was what might be called an action on the case. It was clear law that a company might be libeled as well as an individual, but a libel could only be constituted by something calculated to bring the company into ridicule or contempt. This might be done by statements relating to the conduct of the business by the directors, but he did not think that a mere statement that the circulation of a newspaper was 5,000 could amount to a libel, and therefore he held that as far as the action was based on libel there was no case." Cf. Heriot v. Stuart, 1–2 Espinasse, 437 (1796).

[2] Griffiths et al. v. Benn, 27 Times Law Reps., 346, 350 (C. A., 1911). Per Cozens-Hardy, M. R.: "There is a violent, and, as the jury have found, an unjustifiable attack upon the 'G. B.' system—an attack which has not been proved to have caused any special damage. It seems to me extravagant to argue that an attack upon the system must be regarded as an imputation upon the owner of the patents who supplies the parts and licenses the use of the system."

[3] Société Francaise Des Asphaltes v. Farrell, 1 Cababé & Ellis, 563 (1885).

[4] Young v. Macrae, 3 B. & S., 264, 269 (1862). The court did not refer to Evans v. Harlow, 5 A. & E. (n. s.), Q. B., 624, 8 Jurist, 571 (1844), where the court held that an advertisement disparaging the plaintiff's lubricators was not, in the absence of an allegation of special damage, ground for an action.

of the four." It was alleged that in consequence of these statements, which were untrue, certain persons ceased to deal with the plaintiffs. The court therefore held that the action could be maintained.[1] Upon similar principles it was held actionable for a company which imported Australian karri and jarrah wood for street paving to write to members of a borough council advising them, before deciding to use American red-gum blocks on a certain roadway, to inspect certain roads which had been paved with this wood and were in a rotten condition after from 6 to 18 months' use. A firm importing the American blocks brought an action based on these letters and alleged special damage. Damages were awarded and the judgment was affirmed on appeal.[2] In an earlier case where it appeared that "Liebig's Extract of Meat" was merely a descriptive title that might be used by any person manufacturing the article according to the Liebig recipe, the defendant was enjoined from issuing labels and advertisements containing the words "This is the only genuine" in connection with extract sold by him.[3]

Similarly, in New South Wales it has been held actionable for a photographer to state, "We are the only photographers supplying the rococo, as it is our own production," where it appeared that the plaintiff also used the so-called rococo process, and that the statement had resulted in loss of business.[4] And in Canada, where the Acme Silver Co. sought to recover special damages resulting from the publication by a competitor of an advertisement in which it was

[1] Western Counties Manure Co. *v.* Lawes Chemical Manure Co., L. R. (1874), 9 Ex., 218, 222. Per Bramwell, B.: "On the general principle, * * * that an untrue statement disparaging a man's goods, published without lawful occasion, and causing him special damage, is actionable, we give our judgment for the plaintiffs."

Per Pollock, B.: "This case, no doubt, involves first principles. On the one hand, the law is strongly against the invention or creation of any rights of action, but on the other hand, where a wrong has actually been suffered by one person in consequence of the conduct of another, one is anxious to uphold as far as possible the maximum 'ubi jus ibi remedium.' It seems to me the present case comes within that rule."

[2] Alcott *v.* Millar's Karri and Jarrah Forests (Ltd.) et al., 91 Law Times Reps., 722 (C. A., 1904). Per Collins, M. R.: "The learned judge, in his summing up, pointed out clearly to the jury what are the conditions under which an action of this kind can be maintained. The learned judge told the jury that 'you may crack up your own goods as long as you like; you may say that your goods are better than anybody else's, and that your goods have qualities that others have not. It may be true or untrue, but you are entitled to do that. You have no right to say of your neighbor's goods that they are bad, or rotten, or whatever it may be, if it is untrue, and if damage results to your rival.'"

[3] Liebig's Extract of Meat Co. (Ltd.) *v.* Anderson, 55 Law Times Reps., 206 (1886).

[4] George *v.* Blow, 20 New South Wales Law Reps., 395, 399 (1899). Per Darley, C. J.: "The case * * * closely resembles the case of Liebig's Extract of Meat Co. *v.* Anderson. * * * Mr. Justice Chitty, in granting an injunction to restrain the use of these words, stated that they amounted to a clear statement that what the plaintiffs sold was not genuine, and so in this case the statement put forward to the public was a clear intimation that no photographer but the defendant can supply genuine rococo photographs, and that all others purporting to be rococo photographs are spurious." Cf. Thorley's Cattle Food Co. *v.* Massam, p. 378, and Jarrahdale Timber Co. *v.* Temperley & Co., p. 385n.

stated that they did not keep "Acme or common plate," it was held that the action could be maintained.[1]

A distinction has been drawn between direct statements of fact respecting the goods of another and mere "puffs," or statements made in the form of a comparison favorable to one's own goods and incidentally disparaging the goods of a competitor. Although statements of either description may result in damage, the former only are actionable. In the language of Lord Watson in a leading case, "Every extravagant phrase used by a tradesman in commendation of his own goods may be an implied disparagement of the goods of all others in the same trade; it may attract customers to him and diminish the business of others who sell as good and even better articles at the same price; but that is a disparagement of which the law takes no cognizance."[2] In an early case it appeared that the defendant published the report of a professor of chemistry in which the defendant's oil was compared with that sold by the plaintiff, and the opinion was expressed that the latter was inferior. As it was not shown in what particular the report was untrue, and it appeared that the only false statement might have been the representation that the defendant's oil was of a superior quality, the court held that the action could not be maintained.[3] Likewise, where the proprietor of "Dr. Vance's prepared food for infants and invalids" sold "Mellin's Infants' Food" after affixing thereto labels recommending a trial of the former, which was stated to be "far more nutritious and healthful than any other preparation yet offered," it was held that no action would lie and that no injunction should be granted. The trial court, being of opinion that the label was merely the puff of a rival trader, dismissed the action, and this judgment was affirmed by the House of Lords.[4] So it was held not actionable

[1] Acme Silver Co. *v.* Stacey Hardware and Manufacturing Co., 21 Ontario Reps., 261 (1891), and see Hamilton *v.* Walters, 4 Upper Canada Q. B., 24 (1834). See also Du Toit *v.* Robinsky & Gotz, 2 South Africa Reps., Cape Provincial Div., 307, 311 (1911), in which the court said: "I take it * * * that where a person, with the malicious intention of injuring another, and to prevent his selling his goods, falsely depreciates the goods and by so doing actually causes damage to such other person, he would be liable in damages for such wrongful act, but in my opinion none of the necessary elements of such action exist in this case."

[2] White *v.* Mellin, L. R. (1895), A. C., 154, 167, 171. Per Lord Shand: "When all that is done is making a comparison between the plaintiff's goods and the goods of the person issuing the advertisement, and the statement made is that the plaintiff's goods are inferior in quality or inferior, it may be, in some special qualities, I think this cannot be regarded as a disparagement of which the law will take cognizance."

[3] Young *v.* Macrae, 3 B. & S., 264 (1862). Per Wightman, J.: "What is here complained of was a comparison between the oil manufactured by the plaintiffs and that sold by the defendant. There is no statement in the alleged libel that the article sold or manufactured by the plaintiffs is a bad article; it is only said that it is inferior to that of some one else; and that is consistent with the plaintiff's article being in itself a very good article."

[4] White *v.* Mellin, L. R. (1895), A. C., 154, 165. Per Herschell, L. C.: "If an action will not lie because a man says that his goods are better than his neighbour's, it seems to me impossible to say that it will lie because he says that they are better in this or that or the other respect. Just consider what a door would be opened if this were per-

to publish a circular concluding with the words, "Judging the finished work, it is quite evident that W. H. & Co.'s zinc has a slight advantage over Hubbuck's, but for all practical purposes they can be regarded as being in every respect equal."[1] On the other hand, where a newspaper published false statements to the effect that its circulation was 20 to 1 of any other weekly paper in a specified district, and that "where others count by the dozen we count by the hundred," it was held that the statements were more than mere puffs, but were definite statements of fact, and being wholly untrue, were actionable on proof of special damage. As the plaintiffs failed to prove any actual damage, the action was dismissed.[2]

FALSELY REPRESENTING THAT A COMPETITOR HAS CEASED TO CARRY ON BUSINESS.—False representations to the effect that a firm is about to retire from business, or is no longer in existence, are not defamatory, and are actionable only when actual damage has resulted. Thus, where an engineer and boilermaker brought an action against a newspaper, grounded on a statement to the effect that he had ceased to carry on business and that the firm no longer existed, the jury found that the words did not reflect upon the plaintiff's character and were not libelous, but that the statement was not published bona fide, and that the plaintiff's business had suffered injury to the extent of £120. A judgment for that sum was accordingly entered.[3] So, where the agent of a publishing company knowingly made false state-

mitted. That this sort of puffing advertisement is in use is notorious; and we see rival cures advertised for particular ailments. The court would then be bound to inquire, in an action brought, whether this ointment or this pill better cured the disease which it was alleged to cure—whether a particular article of food was in this respect or that better than another. Indeed, the courts of law would be turned into a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better."

[1] Hubbuck & Sons *v.* Wilkinson, Heywood & Clark, L. R. (1899), 1 Q. B., 86, 92, 94. Per Lindley, M. R.: "Even if each particular charge of falsehood is established, it will only come to this—that it is untrue that the defendants' paint is better than or equal to that of the plaintiffs, for saying which no action lies. * * * It is not necessary to consider how the case would have stood, if the defendants had not been rival traders simply puffing their own goods and comparing theirs with those of the plaintiffs."

[2] Lyne *v.* Nicholls, 23 Times Law Reps., 86 (1906).

[3] Ratcliffe *v.* Evans, L. R. (1892), 2 Q. B., 524. Per Bowen, L. J.: "That an action will lie for written or oral falsehoods, not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title. To support it, actual damage must be shewn, for it is an action which only lies in respect of such damage as has actually occurred."

See also Jarrahdale Timber Co. (Ltd.) *v.* Temperley & Co., 11 Times Law Reps., 119 (Q. B. Div., 1894), where the plaintiff firm imported Australian jarrah timber, and a competitor dealing in karri as well as jarrah was restrained from advertising that they were "the only importers of both timbers in the United Kingdom," or from stating directly or indirectly that they were the only importers of jarrah timber. Although it does not appear from the report of this case whether or not special damage was alleged, counsel for plaintiff relied upon Western Counties Manure Co. *v.* Lawes Chemical Manure Co. (see p. 383), and Ratcliffe *v.* Evans (above), in both of which cases the court pointed out the necessity of such an allegation.

ments, some to the effect that the business of a competitor had been taken over by his employers, and others to the effect that it was going out of one branch of its business, a judgment for damages and an injunction was entered by a Canadian court against the agent and the company he represented. It may be noted that the statements had been acted upon by the persons to whom they were made and resulted in actual damage to the plaintiff.[1] On the other hand, where a proceeding was instituted in the form of an action for slander against a lawyer who circulated a report to the effect that an insurance company was about to be taken over by a rival, a Scottish court refused to submit the case to the jury, being of opinion that the statement would not amount to slander, although it might be injurious to the business.[2] And, where the evidence of damage was not sufficient, the court declined to restrain a company from falsely representing by circulars that a certain partnership was retiring from business, notwithstanding the fact that the circulars were issued maliciously and were calculated to keep customers away.[3]

Section 8. Misrepresentation by means other than words.

AMERICAN DECISIONS.

There may be acts which do not constitute libel or slander in the ordinary sense, but which have substantially the same effect upon the business of another. Thus where such conduct resulted in the loss of patronage it was held actionable to loosen a horseshoe recently put on by a blacksmith and to drive a nail into the horse's foot for the purpose of injuring the reputation of the workman.[4]

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[1] Sheppard Publishing Co. *v.* Press Publishing Co., 10 Ontario Law Reps., 243 (1905). Cf. Dudley *v.* Briggs, 141 Mass., 582 (1886).

[2] General Accident Assurance Corporation (Ltd.) *v.* Miller, 9 Scots Law Times, 510 (1902). Per Lord Low: "No doubt the statement that one insurance company is to be taken over by another is likely to give rise to speculation as to the reason, but I do not see why it should induce the 'belief' in the public mind that the company to be amalgamated was in a weak condition financially."

Cf. Continental Insurance Co. *v.* Board of Underwriters of the Pacific, p. 377n; Baltimore Life Insurance Co. *v.* Gleisner, 202 Pa. St., 386 (1902); and American Insurance Co. *v.* France, 111 Ill. App., 382 (1903).

[3] Concaris *v.* Duncan & Co. (1909), Weekly Notes, 51.

[4] Hughes *v.* McDonough, 43 N. J. Law, 459, 463, 464 (1881). Per Beasley, C. J.: "What, in point of substance, was done by the defendant, was this: He defamed, by the medium of a fraudulent device, the plaintiff in his trade, and by means of which defamation, the latter sustained special detriment. If this defamation had been accomplished by words spoken or written, or by signs or pictures, it is plain the wrong could have been remedied, in the usual form, by an action on the case for the slander; and, plainly, no reason exists why the law should not afford a similar redress when the same injury has been inflicted by disreputable craft." (N. B.—It does not appear whether the defendant was a competitor or not.)

Cf. United States *v.* Patterson et al., 205 Fed., 293, 300 (1913), where there was evidence tending to show that one of the agents of the National Cash Register Co. "distributed small wires to other agents in his territory for the purpose of their surreptitious introduction into competitors' cash registers, if the customer gave opportunity to the National's agents for close examination of the competitors' cash register in the customer's possession." See also Attorney General *v.* National Cash Register Co., 148 N. W., 420

Likewise the omission of the name of a company may be actionable where it amounts to a statement that no such company exists. Where, for example, the owner of an express business in Boston brought suit against two competitors and a corporation publishing what purported to be a complete list of all reputable express companies doing business in that city, alleging that the defendant competitors induced the corporation to exclude the complainant from its publications by falsely stating that complainant's business was not conducted in a proper and reliable manner and by threatening, in case of a refusal, that they would not furnish data for such publication, that they would diminish the advertising obtainable by it and otherwise injure its business, the court expressed the opinion that the desire of the defendants to advance their own interests in competition was not a justification and held that upon proof of the facts alleged the complainant would be entitled to an injunction to protect him from the wrongful publication and to prevent the defendant competitors from attempting to procure this kind of publication in the future.[1]

Section 9. False claims to testimonials, medals, and other distinctions.

The reports of a number of cases disclose the fraudulent use by manufacturers, of testimonials, medals, or other distinctions awarded competitors. Under such circumstances, however, and in the absence of any attempt to pass off the goods of one manufacturer as those of another, the courts have refused to interfere.[2]

(Mich. Sup. Ct., 1914), and petition and decree in United States *v.* Burroughs Adding Machine Co. et al.

In United States *v.* Standard Oil Co. of New Jersey et al. the Government contended that "the plan of pretending to the trade that competitors were overgauging barrels was one that was adopted and put into force by the Standard Oil Co. itself. It has cropped out here and there in this testimony that Standard Oil agents would go to the dealers and after gauging their cans or their barrels invariably found them incorrect and invariably found that the dealer was cheating his patrons, and sought in that way to get the business away from the independents." (C. C., E. D. Mo., Brief of Facts and Argument for Petitioner, vol. 2, pp. 529, 536–537.)

[1] Davis *v.* New England Railway Publishing Co. et al., 203 Mass., 470, 478, 479 (1909). Per Knowlton, C. J.: "The defendant corporation professes to give the public a full list of all the reputable express companies doing business in Boston. While it does not say in express words that the list is complete, that is the meaning which the publication is intended to convey and does convey. Its list is false and misleading, to the plaintiff's injury. * * * The direct effect of the false statement is to point those who want the services of an express company to other companies, and to divert them from the plaintiff. They are told, in substance, that there is no such person as the plaintiff, and no such company as the Northern Express Co. (plaintiff's company), engaged in this kind of business. * * * An intentional act of this kind, without excuse, is a violation of his legal rights. It is the publication of a falsehood concerning him, the direct and natural effect of which is to injure him in his business. The public is misled by the intentional publication of an incorrect list. * * * But the gist of the plaintiff's action is the wrong done him by intentionally turning away from him those who otherwise would do business with him. He is entitled to a remedy for this wrong. * * * The injury is to property, and it is not technically a libel upon the plaintiff."

[2] This practice has been prohibited by statute in a number of States. See p. 517.

AMERICAN DECISIONS.

The best known, if not the only case of this description in this country was decided by the Supreme Court of Georgia, which denied an injunction to restrain the Domestic Sewing Machine Co. from publishing statements to the effect that the exhibition committee of the State agricultural society had reported that the Domestic was the best family machine, notwithstanding the fact that the Singer Co. had been awarded a diploma for exhibiting the best family machine and the best machine for manufacturing purposes.[1]

ENGLISH DECISIONS.

A somewhat similar case had previously been decided in England when a manufacturer who had been awarded a prize medal at an exposition complained of the action of a competitor in selling pickles under labels bearing the words, "Prize medal, 1862." The court concluded that there had been no attempt to pass off the defendant's goods as those of the plaintiff, and refused an injunction.[2]

In a more recent case it appeared that extracts from an article in a medical journal commenting favorably on a certain patented system of treating disease had been reprinted in a manner calculated to lead readers to believe that they referred to a rival system of treatment. Urging that this was an attempt to appropriate the reputation acquired by the system thus favorably mentioned, and a species of unfair competition, the patentee sought an injunction. It was

[1] Singer Manufacturing Co. *v.* Domestic Sewing Machine Co. et al., 49 Ga., 70 (1872).

[2] Batty *v.* Hill, 1 H. & M. Ch. Cas., 264 (1863). After this judgment was rendered, and partly in consequence thereof, Parliament passed "The Exhibition Medals Act, 1863" 26, 27 Vict., ch. 119 (July 28, 1863), providing for the summary prosecution of any trader who (1) falsely represents that he has obtained a medal or certificate from the exhibition commissioners in respect of any article or process for which a medal or certificate has been awarded by the commissioners; (2) falsely represents (knowing such representation to be false) that any other trader has obtained a medal or certificate from the exhibition commissioners; or (3) falsely represents (knowing such representation to be false) that any article sold or exposed for sale has been made by, or by any process invented by, a person who has obtained in respect of such article or process a medal or certificate from the exhibition commissioners.

During the debate on this measure it was stated that "a monstrous system of fraud prevailed in regard to these medals, which ought to be checked without delay." (Great Britain, Parliamentary Debates, July 27, 1863, pp. 1483–1486.)

See also Green *v.* Archer, 7 Times Law Reps., 542 (Q. B. Div., 1891), where it appeared that the parties, who were architects, had, while conducting their business as partners, jointly designed and supervised the construction of many important buildings in London. Immediately after a dissolution of the partnership Archer circulated photographs of these buildings, bearing in large letters at the foot of each copy the words "Designed by Thomas Archer, R. R. I. B. A., 14 Sackville Street, Piccadilly," omitting all reference to the former partner. Green brought an action for libel and sought an injunction. Mr. Justice Denman gave judgment for the defendant, holding that the words conveyed no imputation upon the character of the plaintiff and did not allude to him as an architect, and, further, that there was no slander of title.

held, however, that in the absence of any attempt to pass off the defendant's system as the plaintiff's the court ought not to interfere.[1]

Likewise in Canada the court refused to enjoin the publication, in an altered form, of certain testimonials respecting organs manufactured by the D. W. Karn Co. under the superintendence of one Warren, in which the latter as well as the company had been commended.[2]

On the other hand an injunction was granted where, in addition to the reproduction of certain testimonials given to the plaintiff, it appeared that his reputation was being used as a means of passing off the defendant's goods.[3]

Section 10. Intimidation of competitors' customers by threats of infringement suits.

Manufacturers of patented articles have not infrequently sought to prevent the sale of competing articles by circulating broadcast printed statements asserting that such articles infringed their patents and threatening all dealers handling them with suits for infringement. Circulars or letters of this character have at times been supplemented by oral statements of traveling salesmen and other em-

[1] Tallerman *v.* Dowsing Radiant Heat Co., L. R. (1900), 1 Ch. Div., 1. The plaintiffs appealed. The appeal was not heard, but on the defendants giving a perpetual undertaking not to print, publish, issue, or circulate any pamphlet, notice, circular, or advertisement containing any press notice, testimonial, or other document, or any extract therefrom, originally written in favor of the plaintiffs' hot-air treatment, it was ordered that the defendants should pay to the plaintiffs £25 for their costs of the action, and that all further proceedings in the action should be stayed. The plaintiffs were to be at liberty for one month from the date of the order to advertise in any manner they might think proper a statement of the names of the parties to the action, that the action was for an injunction, and the contents of this order, but without making any comment thereon, and, save as aforesaid, the plaintiffs agreed not to advertise or publish the order.

[2] Warren *v.* The D. W. Karn Co., 15 Ontario Law Reps., 115, 117 (1907). Per Boyd, C.: "Many doubtful and it may be unwarrantable acts must be left to the verdict of conscience or to the judgment of public opinion, and the present grievance appears to be one falling outside of legal limits and to be resolved in the court of conscience.

"Tested by the business maxim 'Every man for himself,' the pamphlet may be regarded as a shrewd stroke of advertising; tested by the golden rule of fair dealing, it would not, in my opinion, fare so well. The testimonials were given for the joint work of the company and its guiding spirit, the then superintendent; to use them so as to exclude the latter appears to be an unfair use."

[3] Franks *v.* Weaver, 10 Beav., 297 (1847); 8 Law Times Reps. (O. S.), 510, 512. Per Lord Langdale: "* * * if anybody critically reads the advertisement of the defendant, he will find that he does not, in direct terms, apply the encomiums given to the plaintiff's preparation to his own; he does not even say, that the preparation he is selling is made by the plaintiff, and yet, for all that, nobody can look at all these things without observing that the name and the testimonials of the plaintiff are so craftily employed, as to be well calculated to produce, in the minds of ordinary readers, the impression that the mixture or solution prepared and sold by the defendant is the same as that to which these testimonials are applicable; that is to say, the mixture or solution of the plaintiff."

After granting an injunction in the ordinary form the master of the rolls restrained the defendant from publishing or circulating any cover, wrapper, etc., containing any testimonial in favor of the plaintiff's preparation, or in which any use was made of the character and reputation of the plaintiff as applicable to any preparation or compound of the defendant or his firm.

ployees. The destructive effects of this practice, when persisted in, are thus described by Quarles, J., in Dittgen *v.* Racine Paper Goods Co.:[1]

> If such a campaign be skillfully conducted for a series of years, as seems to have been the case here, the competitor is helpless. His orders are countermanded, old customers desert him, through fear of litigation, or demand bond of indemnity as a condition for placing orders. His business is melting away. Everywhere the trade is apprehensive of 'peremptory measures' if they buy goods of an infringer. He appeals to the patentee to bring suit, and offers to enter an appearance in any court having jurisdiction, but all to no purpose. Customers will not listen to his explanations or denials, and unless he can get relief in a court of equity, his business, which represents 20 years of effort, may be entirely ruined by a competition which is malicious and unfair.

Both Federal and State courts have characterized this practice as "unfair competition,"[2] as being "unfair in the business world," or as constituting "unfair business methods."[3] Thus where a manufacturer had persisted in threatening a competitor's customers with suits for infringement, the Federal circuit court, in the course of an opinion in a suit to restrain such threats, said:[4]

> Without reciting the evidence more in detail, I am driven to the conclusion that defendant has been guilty of unfair competition and has thereby maliciously diverted and injured the trade of complainant; that against such unfair methods complainant could obtain no adequate remedy in the courts of law; that he has sustained substantial loss in his business, and is therefore entitled to an injunction and an accounting as prayed.

And the circuit court of appeals in the same case said, per Kohlsaat, J.:[5]

> Undoubtedly, one claiming that his patent is being infringed should take steps to advise the public of his rights as provided by statute, provided, however, that if it is made to appear that under pretense of so doing he is pursuing a course which is calculated to unnecessarily injure another's business, and with the plain intention of so doing, his conduct will be deemed malicious, and he brings himself within the rule of law obtaining in cases of unfair competition in trade, and subject to injunction.

In a subsequent suit of the same character the Federal circuit court, referring to similar threats, said:[6]

> A threat of punishment is intimidation and is unfair in the business world.

And the Michigan Supreme Court, in an action by the State against the National Cash Register Co., in which the latter was charged with certain unfair competitive methods, said:[7]

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[1] 164 Fed., 85 (C. C., 1908); s. c., 171 Fed., 631 (C. C. A., 1909).
[2] Dittgen *v.* Racine Paper Goods Co., above.
[3] Electric Renovator Mfg. Co. *v.* Vacuum Cleaner Co. et al., 189 Fed., 754 (C. C., 1911).
[4] Dittgen *v.* Racine Paper Goods Co., 164 Fed., 85, 91 (C. C., 1908).
[5] 171 Fed., 631 (1909).
[6] Electric Renovator Mfg. Co. *v.* Vacuum Cleaner Co. et al., 189 Fed., 754 (C. C., 1911).
[7] Attorney General *v.* National Cash Register Co., 148 N. W., 420, 428 (Mich. Sup. Ct., 1914).

There is no question that it is lawful and proper for the owner of a patent to give a notice of infringement of his patent to any infringer thereof, or to any user of an infringing article. It is also his legal right to bring and prosecute a proper suit to restrain an infringer or user, and he may bring and prosecute a suit for recovery of damages against an infringer or user. Such suit, however, must be honestly brought and prosecuted in good faith, and not commenced and prosecuted to harass, annoy, intimidate, financially embarrass, and drive out of business a competitor, for such acts and conduct would amount to unlawful and unfair competition.

AMERICAN DECISIONS.

It appears to be settled that the Federal courts will restrain the issuance of letters or circulars threatening to sue a competitor's customers for infringement where such letters are written, not bona fide to warn the trade of the writer's claims of infringement, and in good faith intending to bring such actions as are threatened, but for the express purpose of frightening away a competitor's customers and thus injuring his business.

Thus where a manufacturer of slates persisted in distributing circulars threatening to sue dealers for infringement if they handled the slates of a rival, it was held that an injunction should issue restraining the distribution of such circulars, it clearly appearing that the threats were not made in good faith, but for the express purpose of frightening the competitor's customers and injuring his business.[1] Similarly the Federal circuit court of appeals held that a company owning patents on spring-tooth harrows, and licensing manufacturers to make them, should be enjoined, at the instance of a rival, from distributing circulars claiming that the latter's harrows were an infringement and threatening to sue dealers who handled them, where the company charged with infringement had requested the competitor to bring suit to determine the question, but it de-

[1] Emack *v.* Kane et al., 34 Fed., 46, 49, 51 (C. C., 1888). Per Blodgett, J.: "The proof in this case also satisfies me that these threats made by defendants were not made in good faith. The proof shows that defendants brought three suits against Emack's customers, for alleged infringement of the Goodrich patent by selling the Emack slates; that Emack assumed the defense in these cases, and, after the proofs were taken, and the suits ripe for hearing, the defendants voluntarily dismissed them, the dismissals being entered under such circumstances as to fully show that the defendants knew that they could not sustain the suits upon their merits; that said suits were brought in a mere spirit of bravado or intimidation, and not with the *bona fide* intent to submit the question of infringement to a judicial decision * * *.

"The effect of the circulars sent out by the defendant Kane certainly must have been to intimidate dealers from buying of the complainant, or dealing in slates of his manufacture, because of the alleged infringement of the Goodrich patent. No business man wants to incur the dangers of a lawsuit for the profits which he may make as a jobber in handling goods charged to be an infringement of another man's patent. The inclination of most business men is to avoid litigation, and to forego even certain profits, if threatened with a lawsuit which would be embarrassing and vexatious, and might mulct them in damages far beyond their profits; and hence such persons, although having full faith in a man's integrity, and in the merit of his goods, would naturally avoid dealing with him for fear of possibly becoming involved in the threatened litigation."

clined to do so and continued to distribute the circulars, and where it otherwise appeared that the company did not in fact believe that it could recover in an action for infringement, but was making the threats with the sole purpose of intimidating the rival's customers.[1] And where a manufacturer of cigar pouches represented to the trade, by letters and oral statements, that a competitor's pouches infringed its patents, and threatened to sue any who continued to use them, and further represented that it had secured an injunction restraining the competitor from manufacturing such pouches, and where it also appeared that the competitor charged with infringement had requested the company making such charges to commence suit to determine the rights of the respective parties and had offered to accept service in any court of competent jurisdiction, but it nevertheless refused to bring suit and persisted in circulating the threatening letters, it was held that their distribution should be restrained and that the injured rival was also entitled to damages.[2] In like manner where a company engaged in the manufacture of apparatus for renovating house furnishings, distributed letters threatening suit against the users of a competitor's machines, demanding an accounting of the profits realized from such machines and for damages suffered, notwithstanding the fact that the competitor had requested that suit be instituted to determine the question of infringement, the Federal circuit court held that the rival company attacked in this manner was entitled to an injunction. The court stated in this case that the company distributing such circulars was chargeable with bad faith and unfair business methods in threatening its competitor's customers with suits and refusing to bring any suit to determine the rights of the parties.[3]

On the other hand, where it appears that such letters are sent out in good faith, for the purpose of protecting the writer's patents and as a bona fide warning to supposed infringers, the courts decline

[1] Adriance, Platt & Co. *v.* National Harrow Co. et al., 121 Fed., 827, 829 (C. C. A., 1903). Per Wallace, J.: "Undoubtedly the owner of a patent is acting within his rights in notifying infringers of his claims, and threatening them with litigation if they continue to disregard them; nor does he transcend his rights when, the infringer being a manufacturer, he sends such notices to the manufacturer's customers, if he does so in good faith, believing his claims to be valid, and in an honest effort to protect them from invasion. The question whether the patent owner is acting in good faith in advertising his claims to the manufacturer's customers by circulars or letters can seldom be determined from the contents of the communication alone, and, like all questions of intent, must generally be determined by the extrinsic facts. It is always easy to frame such circulars in guarded terms, which will not commit the sender to any definite libelous charges, omitting specific statements of fact, and substituting statements of opinion; and when they are sent for an illegitimate purpose they are likely to be so framed." See also Farquhar Co. (Ltd.) *v.* National Harrow Co., 102 Fed., 714 (C. C. A., 1900), and Lewin *v.* Welsbach Light Co., 81 Fed., 904 (C. C., 1897).

[2] Dittgen *v.* Racine Paper Goods Co., 164 Fed., 85 (C. C., 1908); affirmed, 171 Fed., 631 (1909).

[3] Electric Renovator Mfg. Co. *v.* Vacuum Cleaner Co. et al., 189 Fed., 754 (C. C., 1911); s. c., ibid, 1023.

to interfere. For example, where a company brought suit against a competitor for infringement of its patents and notified the latter's customers of the alleged infringement and of the institution of the suit, an injunction to prevent the further circulation of such letters was refused, there being no proof that they were sent out for any purpose other than the protection of the company's rights under its patent.[1] So, also, a manufacturer who had brought suit to determine the question of infringement was held to be within his rights in circulating letters warning the customers of the infringer of the proposed suits, and the fact that the patent had been declared invalid in another circuit was held not to affect the right of the patentee to distribute warnings in a circuit where the question was still open and suit had been brought to determine it.[2] And in another case, where the owner of a patent had instituted suit for its infringement and was circulating letters notifying the infringer's customers of its claims, it was held that an injunction should not issue to restrain the distribution of the letters, it not being proven that the complaining patentee did not intend to prosecute the suit to a conclusion. The mere fact that a suit had previously been brought by the complaining patentee's assignor in another jurisdiction, and had been dismissed, was held not sufficient to show want of good faith in sending out the warning letters.[3]

The decisions of the State courts on this subject are not in accord. An injunction has been granted restraining the issuance of threatening communications where the language was too "excessive and ill chosen to convey simple information" that the sender's patent was being infringed.[4] The publication of an advertisement falsely stating that another's article was an infringement has been restrained,[5] and an injunction has also been granted restraining a patentee from issuing or publishing any demand for royalty or license fees for the use of an invention covered by another's patent, and from threatening litigation against those who might buy the patented

[1] United Electric Co. *v.* Creamery Package Mfg. Co. et al., 203 Fed., 53 (D. C., 1913).

[2] Clip Bar Mfg. Co. *v.* Steel Protected Concrete Co., 209 Fed., 874, 875 (D. C., 1913). Per Thompson, J.: "It nowhere appears on the record that the notices given to the plaintiff's customers were not in good faith or that they were false or malicious or for the purpose of destroying the business of the plaintiff. To the contrary, the defendant, so far as appears, believing its claims to be valid, has proceeded to bring suit in this district to establish infringement. Under these circumstances, it must be held for the purpose of the present motion that the defendant is acting within its rights."

[3] New York Filter Co. *v.* Schwarzwalder et al., 58 Fed., 577 (C. C., 1893). See also Kelley *v.* Ypsilanti Dress-Stay Mfg. Co., 44 Fed., 19 (C. C., 1890); Warren Featherbone Co. *v.* Landauer, 151 Fed., 130 (C. C., 1903); Mitchell *v.* International Tailoring Co., 169 Fed., 145 (C. C., 1909); Welsbach Light Co. *v.* American Lamp Co., 99 Fed., 501 (C. C., 1899).

[4] Croft *v.* Richardson, 59 How. Prac. Reps., 356 (N. Y., 1880). See also Schwanbeck Bros. *v.* Backus & Sons, 148 Mich., 508 (1907).

[5] Snow & Bush *v.* Judson, 38 Barbour, 210 (N. Y., 1862).

article.[1] In the latter case, however, it appeared that the defendant was insolvent, thus making the remedy by a suit at law for damages inadequate. The Illinois Appellate Court has declined to grant an injunction where the threats were made in good faith but before any suit was begun to settle the question of infringement.[2] The Massachusetts courts regard the circulation of communications of this sort as constituting either libel or slander of title or merely misrepresentation as to the character or quality of the patentee's property or the title thereto, and hold that a court of equity has no jurisdiction to grant injunctions in cases of this character.[3]

ENGLISH DECISIONS.

The liability of patentees for threats to institute infringement proceedings was the subject of legislation in England in 1883.[4] For this reason the decisions at the common law are here dealt with very briefly.

There were a number of cases prior to 1883 in which the plaintiffs sought to restrain the issuance of circulars or letters threatening to sue their customers for infringement or to recover damages for such action. The decisions are not entirely in accord, but it appears that to recover damages at common law it was necessary for the plaintiff to prove not only that the statements of infringement were untrue but also that they were not made bona fide or, as it is sometimes expressed, that they were made without reasonable or probable cause. An injunction would also issue in such cases to restrain the further circulation of such threats. Where the statements of infringement were proved to be untrue and there was evidence that the defendants subsequently continued to distribute the notices, an injunction to restrain such distribution would lie, mala fides being necessarily shown by the continued publication after the untruth had been determined.[5] In Wren *v.* Weild[6] the court said:

"* * * We think the action could not lie unless the plaintiffs affirmatively prove that the defendant's claim was not a bona fide claim in support of a right which, with or without cause, he fancied he had; but a mala fide and malicious attempt to injure the plaintiffs by asserting a claim of right against his own knowledge that it was without any foundation."

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[1] Shoemaker *v.* South Bend Spark Arrester Co., 22 L. R. A., 332 (Ind. Supreme Ct., 1893). See also New Iberia Extract of Tabasco Pepper Co. *v.* E. McIlhenny's Son et al., 61 So., 131 (La. Sup. Ct., 1912).

[2] Everett Piano Co. *v.* Bent, 60 Ill. App., 372 (1895).

[3] Boston Diatite Co. *v.* Florence Mfg. Co. et al., 114 Mass., 69 (1873); Whitehead *v.* Kitson, 119 Mass., 484 (1876); Aberthaw Construction Co. *v.* Ransome, 192 Mass., 434 (1906).

[4] See p. 543.

[5] Wren *v.* Weild, L. R. (1869), 4 Q. B., 730; Rollins *v.* Hinks, L. R. (1872), 13 Eq., 355; Axmann *v.* Lund, L. R. (1874), 18 Eq., 330; Halsey *v.* Brotherhood, L. R. (1880), 15 Ch. Div., 514; s. c., L. R. (1881), 19 Ch. Div., 386.

[6] L. R. (1869), 4 Q. B., 730.

In Lycett Saddle, etc., Co. *v.* Brooks & Co.[1] the court said:

"* * * It is necessary for them suing under the common law to prove not only that the statements are untrue but that they are made maliciously, or, as it has been sometimes expressed, without reasonable and probable cause."[2]

Section 11. Combinations to cut off competitors' supplies or to destroy their market.

A number of cases have arisen involving the legality at the common law of concerted action by manufacturers or traders to embarrass or drive out of business an objectionable competitor. The principal methods employed for this purpose have been in the case of retail dealers, to cut off their supplies by boycotting, or threatening to boycott, the wholesalers or manufacturers from whom they purchase; and in the case of manufacturers or wholesale dealers, to destroy the market for their goods by a concerted withdrawal of patronage. In practically all of the reported cases involving the legality of these methods of competition the defendants have been members of trade associations. In one case, however, the plaintiff claimed to have been injured by the members of a steamship conference.[3]

By the weight of American authority these methods appear to be illegal. The English courts, however, in most cases have adopted the contrary view. It may be noted that even in England, where the efforts of a print sellers' association to cut off the supplies of a competitor by inducing dealers not to patronize publishers who sold to him were held lawful, the defendant's counsel, one of whom was Rufus Isaacs (now lord chief justice), urged that the statement of claim disclosed no cause of action, "as it only alleged an unfair competition on the part of the defendants."[4] In some cases American courts have not only condemned such practices but have contrasted them with "honest"[5] and "lawful"[6] competition, "fair, open competition"[7] or "fair and free competition."[8]

On the other hand, Carland, district judge, expressed the opinion that the action of an association of retail dealers in notifying wholesalers and jobbers that they were opposed to sales by such wholesalers and jobbers to mail-order houses and requesting the former not to

[1] 21 R. P. C., 656 (1904).

[2] As to common-law liability, see also Dredge *v.* Parnell, 13 R. P. C., 392 (1896); Alfred Appleby's Twin Roller Chain (Ltd.) *v.* Albert Eadie Chain (Ltd.), 16 R. P. C., 318 (1899); Craig *v.* Dowding, 25 R. P. C., 259 (1908).

[3] Mogul Steamship Co. *v.* McGregor, Gow & Co., L. R. (1892), A. C., 25.

[4] Boots *v.* Grundy, 16 Times Law Reps., 457 (1900).

[5] Doremus *v.* Hennessy, 62 Ill. App., 391 (1896), aff., 176 Ill., 608 (1898).

[6] Doremus *v.* Hennessy, supra, and Klingel's Pharmacy *v.* Sharp & Dohme et al., 104 Md., 218 (1906).

[7] Jackson et al. *v.* Stanfield et al., 137 Ind., 592 (1894).

[8] Bailey *v.* Master Plumbers, 103 Tenn., 99 (1899).

sell to the latter, was not "unfair trade competition," and that "persuasion" was not "unfair competition."[1]

AMERICAN DECISIONS.

CUTTING OFF COMPETITORS' SUPPLIES.—In a number of cases concerted action by dealers to cut off supplies from objectionable competitors has been held lawful. Thus a Federal circuit court has held that it is not unlawful for the members of a retail dealers' association to mutually agree that they will not purchase merchandise from wholesalers and jobbers who sell to catalogue or mail-order houses, and in pursuance of such agreement to notify wholesalers and jobbers that they are opposed to such sales and request that their trade be confined to "legitimate" retail dealers.[2] And in Rhode Island, where it appeared that the members of a national association of master plumbers resolved to withdraw their patronage from any firm selling supplies to others than members of their association or local affiliated organizations, and that as a result of notices sent to certain wholesale dealers not to sell to nonmembers the complainants, master plumbers, were unable to purchase supplies, the court denied an injunction, being of opinion that the object of the members of the association was to free themselves from the competition of nonmembers, and that this was lawful; that the agreement not to deal with wholesalers who sold to nonmembers, and the sending of notices to that end, was lawful; and that, as neither the object of the combination nor the means adopted was unlawful, there was no ground for a charge of conspiracy.[3] In a Pennsylvania case it appeared that in resisting the demands of striking workmen the members of a planing-mill association and a builders' exchange induced lumber dealers and others not to sell materials to dealers who in turn supplied certain contractors and builders who had conceded the demands of the workmen. It appeared that one dealer had been advised that "it would be to his advantage to discontinue" supplying the plaintiff, and that thereafter his orders had been refused. In view of the Pennsylvania statutes legalizing combinations of workmen for certain purposes, it was held that the com-

[1] Montgomery Ward & Co. *v.* South Dakota Retail Merchants & Hardware Dealers' Association et al., 150 Fed., 413 (C. C., 1907).

[2] Montgomery Ward & Co. *v.* South Dakota Retail Merchants & Hardware Dealers' Assn. et al., 150 Fed., 413, 418 (C. C., Dist. S. Dak., 1907). Per Carland, J.: "It must be conceded that complainant has the right to transact and carry on its business free from intimidation or coercion, that this is a property right, and that a combination to interfere with this right otherwise than in fair competition must show justification. The American cases, however, when carefully considered, show that the great weight of authority in the United States, is in favor of the proposition that it is not unfair competition, intimidation, or coercion for a combination to interfere with this right by persuasion or any peaceable means. * * * It thus appears that the retail dealers have done nothing, nor threatened to do anything, which is actionable."

[3] Macauley Bros. *v.* Tierney et al., 19 R. I., 255 (1895).

bination complained of was not unlawful, because (1) it was not made to lower wages regulated by the supply and demand, but to resist an artificial price made by a lawful combination of workmen, and (2) the methods adopted to further the objects of the employers' combination were not unlawful.[1]

In other States, however, the interference by combinations of dealers with the business of competitors has been condemned by the courts. Thus in Indiana, where a retail lumber dealers' association collected from a wholesale dealer a penalty for having sold lumber through a broker in violation of a rule of the association, and so prevented further sales of like description, it was held that the broker was entitled to damages and an injunction restraining certain members of the organization from in any way other than by "fair, open competition," interfering with his business and from demanding a penalty from anyone who might sell to him, or through him to a consumer.[2]

In a subsequent case it appeared that two corporations controlling the manufacture and sale of plumbers' supplies in Indianapolis refused to sell to a licensed plumber solely because he was not a member of the Merchant Plumbers' Association. The plumber thereupon brought an action based on certain sections of the Indiana

[1] Cote *v.* Murphy et al., 159 Pa. St., 420, 431 (1894). Per Dean, J.: "If the employers' combination here had used illegal methods or means to prevent other dealers from selling supplies to plaintiff, the conspiracy might still have been found to exist. The threats referred to, although what are usually termed threats, were not so in a legal sense. To have said they would inflict bodily harm on other dealers, or villify them in the newspapers, or bring on them social ostracism, or similar declarations, these the law would have deemed threats, for they deter a man of ordinary courage from the prosecution of his business in a way which accords with his own notions; but to say, and even that is inferential from the correspondence, that if they continued to sell to plaintiff the members of the association would not buy from them, is not a threat. It does not interfere with the dealer's free choice; it may have prompted him to a somewhat sordid calculation; he may have considered which custom was most profitable, and have acted accordingly; but this was not such coercion and threats as constituted the acts of the combination unlawful." See also Buchanan *v.* Kerr et al., 159 Pa. St., 433 (1894). Cf. Lefebvre *v.* Knott, p. 239.

[2] Jackson et al. *v.* Stanfield et al., 137 Ind., 592, 608, 614 (1894). Per Dailey, J.: "There is such an element of coercion and intimidation in the by-law under consideration, towards the wholesale dealers, manufacturers, and even the members of the society, and such provision made for penalties and forfeitures against them, that it will not do to say it was optional with the wholesale dealer whether it would pay the demand or not, or that it was left to the discretion or choice of the members to either trade with the wholesaler or abandon the association. A conspiracy formed and intended directly or indirectly to prevent the carrying on of any lawful business, or to injure the business of anyone by wrongfully preventing those who would be customers from buying anything from the representatives of such business, by threats or intimidation, is in restraint of trade and unlawful. * * * It is not in point to cite cases where men voluntarily agree to observe rules adopted by themselves. This is no voluntary affair of the wholesale dealers. It is not even a combination of wholesalers. They may, and do, sometimes become honorary members, so as to keep within touch of the retail dealers and secure trade. It is, as stated, an association of retailers to restrict the liberty of wholesalers to sell to consumers and brokers, and the wholesalers must obey or lose their trade. * * * Such rules contravene the rights of nonmembers to earn their living by fair competition."

statutes,[1] charging the supply companies and the association with having combined to suppress competition by fixing prices arbitrarily and selling to members of the association at from 30 to 75 per cent less than list prices, or by refusing to sell to nonmembers and driving them out of business unless they joined the association. The defendants were perpetually enjoined from refusing to sell, or inducing others not to sell to the plaintiff for cash, at the usual and customary prices. This judgment was affirmed by the Supreme Court of Indiana, which held that the statute created no new offense but was declaratory of the common law.[2]

Likewise in Tennessee the supreme court held that certain by-laws of a master plumbers' association in Memphis constituted an unreasonable restraint upon trade, and were contrary to public policy and void under the common law. As demonstrating the "hurtful and unlawful tendency" of the association, the court referred to certain by-laws which prohibited members from purchasing supplies from any dealer who did not comply with the rules of the association, or purchasing "from a jobber who buys material from a manufacturer who sells plumbing or gas-fitting material to any one in our city who is not a member of our association."[3]

In Wisconsin it has been held actionable for wholesale coal dealers owning practically all the coal docks at Superior and Duluth, to enter into a combination with certain retail dealers in Superior and agree to sell coal only to such retailers, for the purpose of forcing out of the trade all retailers not in the combination, where it further appeared that the conspiracy had been successful and that the business of the plaintiff had been destroyed.[4] So in Georgia where a retail druggists' association, in order to prevent a certain firm from obtaining supplies, notified wholesalers and manufacturers throughout the country that said firm was an aggressive price cutter, and required traveling salesmen to procure from the association a card which could be obtained only by signing an agreement not to sell to said firm, and further, gave the manufacturers and wholesalers to understand that unless they refused to sell goods to said firm the members of the association would not buy from them, it was held that the injured firm was entitled to an injunction against the members of

[1] Acts 1899, p. 257; Burns' Ann. Stats. (1908), secs. 3884–3887.

[2] Knight & Jillson Co. et al. *v.* Miller, 172 Ind., 27 (1909).

[3] Bailey *v.* Master Plumbers, 103 Tenn., 99, 116, 117 (1899). Per Caldwell, J.: "These by-laws virtually divided the trade in plumbing materials and supplies for Memphis into two main parts, in the nature of combinations, one of them being represented by members of the association and dealers who sell to them alone, and the other being represented by nonmembers and dealers who sell to them alone; and, thereby, the two classes are intended to be arrayed against each other; not in fair and free competition, but with a view to the utter demolition of the latter class and the entire control of the trade by the former class."

[4] Hawarden *v.* The Youghiogheny & Lehigh Coal Co., 111 Wis., 545 (1901).

the association both collectively and individually.[1] And in Maryland, where a retail druggist brought an action for damages against two firms dealing in supplies, and a retail druggists' association, and alleged that the latter was formed, among other things, for the purpose of maintaining prices and preventing sales to druggists who were unwilling to maintain prices, by threats to blacklist and boycott those who made such sales, and that pursuant to this plan the defendant firms had refused to sell supplies to the plaintiff, it was held that a cause of action had been disclosed.[2] In Iowa, where it was found that the officers and members of an implement dealers' association had, by fraud, coercion, persuasion, and intimidation, prevented and threatened to prevent jobbers and manufacturers from dealing with the plaintiff, a farmers' elevator company, they were, among other things, enjoined from in any manner interfering with its business, and from threatening, annoying or harassing any jobber, wholesaler, or manufacturer for the purpose of preventing them from making or performing any contract with that company.[3] And where a by-law of a farmers' cooperative society required members to sell all their live stock to the society or to forfeit 5 cents per hundredweight from the proceeds of stock sold to competitors, it was held by the Supreme Court of Iowa that a competitor was entitled to an injunction restraining the defendants from demanding or receiving any sum as a condition upon which live stock might be sold to him.[4] In another Iowa case it appeared that certain trade associations had adopted a system of espionage for the purpose of ascertaining the names of the wholesale and jobbing houses that supplied the Farmers' Elevator Co. of Gowrie, and resorted to some form of coercion to cause them to desist. As a result of these methods the elevator company was compelled to keep secret the names of the persons with whom it dealt, and was frequently unable to secure supplies. In a suit to compel the elevator company to transfer certain stock to the plaintiff, and to permit the latter to examine its books, the court, being of the opinion that certain members of these associations were guilty of an unlawful conspiracy to destroy the business of the defendant, or to coerce it into maintaining an approved scale of prices, and further, that the plaintiff stock-

[1] Brown & Allen et al. *v.* Jacobs' Pharmacy Co., 115 Ga., 429 (1902).

[2] Klingel's Pharmacy *v.* Sharp & Dohme, 104 Md., 218 (1906).

[3] Farmers' Elevator Co. *v.* Iowa Implement Dealers' Association et al., unreported decision of Wright, J., in district court of Webster County, Iowa, September term, 1909. See also Report of the Commissioner of Corporations on Farm-Machinery Trade Associations, pp. 154–158.

[4] Reeves *v.* Decorah Farmers' Cooperative Society et al., 160 Iowa, 194, 205 (1913). Per Deemer, J.: "It seems to us that plaintiff has suffered a wrong and that he is threatened with further injury to his business, growing out of defendants' illegal acts. In virtue of his being a competitor with the defendant association, he has the right to free and untrammeled competition with it, and if through illegal means he has been made to suffer in the past, and will do so in the future, he is entitled to the protective arm of the court." See also Ludowese *v.* Farmers' Mutual Cooperative Co., 164 Iowa, 197 (1914).

holder was acting in furtherance of the conspiracy, held that he was entitled to no aid from a court of equity.[1]

A few attempts have been made to compel competitors to maintain prices or otherwise comply with the demands of a trade association by preventing them from obtaining labor necessary for the conduct of their business. Such methods have also been condemned by the courts. Thus, in Illinois, it has been held unlawful for certain members of a laundrymen's association to conspire to injure the business of a competitor because she would not maintain the prices fixed by the combination, and to that end to induce various persons who were doing her laundry work to break their contracts, by falsely representing that she was financially irresponsible, and by threatenings to injure the business of such parties, and also to induce other laundrymen to refuse to take work from her. Although the defendants contended, among other things, that their acts in inducing others to break their contracts were not malicious, but were in the line of "legitimate trade competition" for which they could not be held liable, a judgment in favor of the plaintiff was affirmed by the Supreme Court of Illinois.[2] In a Georgia case it appeared that an employing printers' club had adopted a system of maintaining prices, regulating bidding, and distributing contracts among its members, and that upon the refusal of the plaintiff printing company to comply with a certain demand made by the club the latter had induced the plaintiff's pressmen and other employees to quit work. It was further alleged that when some of the employees returned to work the members of the club threatened that unless the labor unions called a strike in the plaintiff's shop they would no longer observe union regulations, and that in pursuance of this threat some of the members posted their respective businesses as "open shop." Under such circumstances it was held proper to enjoin the de-

[1] Funck *v.* Farmers' Elevator Co. of Gowrie, Iowa et al., 142 Iowa, 621, 625 (1909). Per Evans, C. J.: "The evidence discloses an active conspiracy, which it would be the duty of the court to enjoin if proper jurisdiction could be acquired. Can a court consistently enjoin and punish a conspiracy with one hand, and aid and abet it with the other? It is true that the plaintiff asks nothing in this case that is of itself illegal. If this transaction stood alone, the plaintiff would have the absolute right to the relief demanded, as held by the trial court. But must the court aid a conspiracy to its final goal simply because it travels this part of the way over a legal highway? We think not. In the light of the evidence the plaintiff does not stand before the court as a mere purchaser of stock in the defendant company, but as a conspirator, or a puppet of conspirators, working in conjunction with many others by unlawful means toward an unlawful end." Cf. Forrest *v.* Ry. Co., p. 461.

[2] Doremus et al. *v.* Hennessy, 62 Ill. App., 391 (1896); 176 Ill., 609, 614, 615 (1898). Per Phillips, J.: "Appellants, and those persons who refused to do appellee's work, had each a separate and independent right to unite with the organization known as the Chicago Laundrymen's Association, but they had no right, separately or in the aggregate, with others, to insist that the appellee should do so, or to insist that appellee should make her scale of prices the same as that fixed by the association, and make her refusal to do this a pretext for destroying and breaking up her business. A combination by them to induce others not to deal with appellee or to enter into contracts with her or do any further work for her was an actionable wrong."

fendants from interfering with, or inducing a labor organization to obstruct, the plaintiff's business.[1]

DESTROYING COMPETITORS' MARKET.—Methods similar to those disclosed above have also been employed to prevent manufacturers and others from disposing of their goods. Although in the majority of such cases the defendants have been held liable, in others the courts have held that the acts complained of were not unlawful. Thus, in Minnesota, where it appeared that the members of a retail lumbermen's association had agreed not to deal with any manufacturer who sold direct to consumers at points where members were engaged in business, the action of the secretary of that organization in threatening to notify members that a certain manufacturer had made such sales was held lawful and no ground for an injunction.[2] And in Colorado it has been held lawful for members of a master builders' association to address a letter to a firm of architects about to construct a building, declining to bid on the work if the plaintiff's bid was received in competition.[3] The court expressed the opinion that the architects had not been coerced or intimidated, pointing out that there were at least 50 other contractors from whom they could have solicited bids.

In Texas, on the other hand, it has been held actionable for a lumber dealers' association to distribute circulars to dealers, including the customers of a certain wholesale and retail firm, naming the latter as one which sold to others than "legitimate" dealers, and urging a withdrawal of patronage until this practice was discontinued.[4] And in Vermont, where it appeared that the members of a granite manufacturers' association agreed not to sell to nonmembers, and to impose fines for the violation of the rules of the organization, it was held that the proprietors of a mill who had refused to join the association were entitled to damages caused by a forced with-

[1] Employing Printers' Club et al. *v.* Doctor Blosser Co., 122 Ga., 509 (1905). See also Leonard et al. *v.* Abner-Drury Brewing Co. et al., 25 App. D. C., 161 (1905), and Globe & Rutgers Fire Insurance Co. *v.* Firemen's Fund Insurance Co. et al., 97 Miss., 148 (1910).

[2] Bohn Manufacturing Co. *v.* W. G. Hollis et al., 54 Minn., 223, 234, 235 (1893). Per Mitchell, J.: "It is perfectly lawful for any man (unless under contract obligation, or unless his employment charges him with some public duty) to refuse to work for or to deal with any man or class of men, as he sees fit. This doctrine is founded upon the fundamental right of every man to conduct his own business in his own way, subject only to the condition that he does not interfere with the legal rights of others. And, as has been already said, the right which one man may exercise singly, many, after consultation, may agree to exercise jointly, and make simultaneous declaration of their choice. This has been repeatedly held as to associations or unions of workmen, and associations of men in other occupations or lines of business must be governed by the same principles. Summed up, and stripped of all extraneous matter, this is all that defendants have done, or threatened to do, and we fail to see anything unlawful or actionable in it."

[3] Master Builders' Association et al. *v.* Domascio, 16 Colo. App., 25 (1901).

[4] Olive & Sternenberg *v.* Van Patten et al., 7 Tex. Civ. App., 630 (1894).

drawal of patronage secured by the action of the association.[1] Likewise in Massachusetts, where a quarryman brought an action against the members of a granite manufacturers' association charging a conspiracy to injure him in his business, and it appeared that the by-laws provided that members dealing with nonmembers should "contribute" from $1 to $500 to the association, and that certain members, including most of the customers of the plaintiff, had been compelled to contribute as above stated and had thereafter declined to deal with him, it was held on appeal that it was error to order a verdict for the defendants, and that the case should have been submitted to the jury.[2] A more elaborate combination was involved in a case decided by the Supreme Court of Illinois. It appeared that the plaintiff was the principal competitor of the members of a brick manufacturers' association from which he had been excluded, and that this organization procured an agreement with a masons and builders' association whereby the members of the latter were to purchase brick only from members of the former. It also appeared that the members of a bricklayers' union had agreed to handle brick only for members of the masons and builders' association. There was also evidence tending to show that plaintiff's business was interfered with by representatives of the associations and the labor union, and that hodcarriers as well as bricklayers had refused to handle his brick. A judgment against certain members of the manufacturers' association and the masons and builders' organization was affirmed

[1] Boutwell et al. *v.* Marr et al., 71 Vt., 1, 8, 9 (1899). Per Munson, J.; "Without undertaking to designate with precision the lawful limit of organized effort, it may safely be affirmed that when the will of the majority of an organized body, in matters involving the rights of outside parties, is enforced upon its members by means of fines and penalties, the situation is essentially the same as when unity of action is secured among unorganized individuals by threats or intimidation. The withdrawal of patronage by concerted action, if legal in itself, becomes illegal when the concert of action is procured by coercion. * * * The voluntary acceptance of by-laws providing for the imposition of coercive fines does not make them legal and collectible, and the standing threat of their imposition may properly be classed with the ordinary threat of suits upon groundless claims. The fact that the relations and processes deemed essential to a recovery are brought within the membership and proceedings of an organized body, cannot change the result. The law sees in the membership of an association of this character both the authors of its coercive system and the victims of its unlawful pressure."

See also April et al. *v.* Baird et al., 32 N. Y. App. Div., 226 (1898), where it was held that an action might be maintained against certain members of an unincorporated association to recover damages for a conspiracy to prevent the plaintiffs from carrying on their trade of buying, cutting and selling stone in the city of Brooklyn.

[2] Martell *v.* White et al., 185 Mass., 255, 261 (1904). Per Hammond, J.: "In the case before us the members of the association were to be held to the policy of refusing to trade with the plaintiff by the imposition of heavy fines, or in other words they were coerced by actual or threatened injury to their property. It is true that one may leave the association if he desires, but if he stays in it he is subjected to the coercive effect of a fine to be determined and enforced by the majority. This method of procedure is arbitrary and artificial and is based in no respect upon the grounds upon which competition in business is permitted, but on the contrary it creates a motive for business action inconsistent with that freedom of choice out of which springs the benefit of competition to the public, and has no natural or logical relation to the grounds upon which the right to compete is based. Such a method of influencing a person may be coercive and illegal."

by the appellate court[1] and by the Supreme Court of Illinois.[2] In California, where a fire insurance company complained that certain representatives of a board of underwriters had threatened to boycott firms and individuals holding policies issued by the complainant and other "nonboard" companies unless they forthwith canceled the policies, a Federal court enjoined such threats, and referred to the defendants' conduct as unlawful and unjustifiable.[3] Still other methods employed by combinations of dealers have been declared unlawful. Thus in New York it has been held actionable for the president of a retail druggists' association and others to conspire to ruin the business of other druggists, and to resort to threats, intimidation, libel and slander, and interference with the plaintiffs' advertising.[4] In another case it appeared that the agents of an implement and hardware dealers' association in Washington had interfered with salesmen peddling wagons and buggies for a manufacturer in another State, by following and intimidating them, interrupting their conversations with customers, and advising the latter not to buy. Some of the followers carried rifles, some had been made deputy sheriffs, and in one instance one of the salesmen was arrested by such a sheriff under a provision of a law which had been declared void. The Federal court was of the opinion that such acts constituted an unwarranted interference with the plaintiffs' business and issued a temporary injunction.[5]

ENGLISH DECISIONS.

The most important English case involving the legality of certain methods of competition was decided by the House of Lords in 1891. It was then held lawful for the owners of a number of steamships operating between China and England, in order to secure the entire tea-carrying trade, to enter into agreements providing for the regulation of this traffic as among themselves, the determination of the rates of freight, the semiannual payment of rebates to such persons as shipped exclusively by their vessels, and the sending of vessels to a certain shipping point to secure freight without regard to remu-

[1] Purington et al. *v.* Hinchliff, 120 Ill. App., 523, 533 (1905). Per Freeman, J.: "Lawful competition in trade may have the effect of driving men out of business and creating a practical monopoly in those who survive the struggle. Such competition is legitimate, however, and not actionable, although its effect in particular cases may be similar to that brought about by unlawful means employed to destroy competition. That this may happen is no excuse or justification for the use of unlawful methods, by combination or otherwise, with intent to do a wrongful injury by inducing, as in the case before us, former customers not to deal with appellee nor to buy or use brick of his manufacture."

[2] Purington et al. *v.* Hinchliff, 219 Ill., 159 (1905).

[3] Continental Insurance Co. *v.* Board of Fire Underwriters of the Pacific, 67 Fed., 310 (C. C., 1895).

[4] Rourke et al. *v.* Elk Drug Co. et al., 75 N. Y. App. Div., 145 (1902).

[5] Spaulding et al. *v.* Evenson et al., 149 Fed., 913 (1906); aff. Evenson et al. *v.* Spaulding et al., 150 Fed., 517 (1907). See form of injunction, p. 407.

nerative rates whenever a rival vessel left for that port, and further providing that the agents of parties to the agreement should be prohibited from being interested in rival steamers or from loading sailing vessels belonging to outsiders. A shipping company which had been excluded from this association or conference and had been injured by the carrying out of these agreements brought an action against the members of the combination, alleging a conspiracy, and claiming damages and an injunction. It was held by the House of Lords that as neither the object of the combination nor the means employed were unlawful the action could not be maintained. Lord Halsbury observed that if an offer by the members of an associated body of traders of reduced freights to persons who would deal exclusively with them was unlawful, it would seem "that the greater part of commercial dealings, where there is rivalry in trade, must be equally unlawful;" and Lord Hannen expressed the opinion that this, in effect, is "nothing more than the ordinary form of competition between traders by offering goods or services at a cheaper rate than their rivals."

With respect to rate cutting, Lord Watson said, in part: "I can not for a moment suppose that it is the proper function of English courts of law to fix the lowest prices at which traders can sell or hire, for the purpose of protecting or extending their business, without committing a legal wrong which will subject them in damages." Lord Bramwell also expressed the opinion that in resorting to this method of attracting customers "the defendants did no more than they had a legal right to do."

Lord Watson and Lord Hannen were of opinion that the withdrawal of the defendants' agency from persons who also represented nonconference steamers, could not be regarded as an illegal act, and Lord Morris expressed the view that the dismissal of agents might be questionable, according to circumstances, but in the present case they filled an irreconcilable position in being the agents for two rivals, and that "dismissal under such circumstances became, perhaps, a necessary incident of the warfare in trade."[1] It has also been held lawful for members of a print sellers' association to publish circulars suggesting that dealers agree not to order from houses whose publications were systematically offered by certain notorious undersellers, although the effect of such action was to prevent the plaintiffs from obtaining further supplies from the publishers.[2]

[1] Mogul Steamship Co. (Ltd.) *v.* McGregor, Gow & Co. et al., L. R. (1892), A. C., 25, affirming L. R. (1889), 23 Q. B. D., 598, and L. R. (1888), 21 Q. B. D., 544. Cf. Lough et al. *v.* Outerbridge et al., p. 455.

[2] Boots et al. *v.* Grundy et al., 16 Times Law Reps., 457 (Q. B. Div., 1900). It may be noted that defendants' counsel, one of whom was Rufus Isaacs, Q. C. (now Lord Chief Justice) contended, among other things, that the statement of claim disclosed no cause of action, "as it only alleged an unfair competition on the part of the defendants."

In Scotland, where it appeared that American and Canadian meat could be obtained only at the Yorkhill Wharf, Glasgow, where it was sold at auction, it was held lawful for a butchers' association to notify the cattle salesmen that they would not buy at their auction sales unless they declined to sell to certain competing cooperative stores, and likewise to threaten to withdraw their patronage from hide merchants who dealt with cooperative societies. The court was of opinion that it was lawful for the salesmen to decline to receive bids from such stores and that the butchers were not liable for inducing by lawful means, an act which was lawful in itself.[1]

On the other hand, in Ireland, where the acts complained of would apparently have been illegal in the absence of a combination, the defendants have been held liable. Thus where it was found that certain members of a stevedores' association and representatives of a labor union agreed to compel another stevedore to join the employers' organization, and to that end used threats and procured his laborers to break their contracts of employment, it was held by the Court of Appeal that such conduct was actionable.[2]

In an earlier Irish case it appeared that certain coopers, in order to injure the business of a manufacturer of machine-made firkins, induced a number of butter merchants to publish a notice to farmers stating that they would not purchase butter packed in machine-made firkins, as they had been found to be most injurious to the keeping qualities of butter, and urging the necessity of packing their butter in hand-made firkins. The manufacturer thereupon brought an action against several of the merchants and officers of coopers' societies and guilds claiming an injunction and damages for libel and conspiracy. The court granted an injunction pending the hearing of the case, being of the opinion that if the allegations were proved, damages would not afford sufficient compensation, but that an injunction would be awarded to restrain future acts of a like character.[3]

In Australia it has been held unlawful for a grocers' association to induce the members of a brewers' club not to sell beer to grocers who did not maintain list prices, and accordingly to refuse to sell to a grocer who had reduced prices, until he should join the association.[4] In a more recent case, however, involving substantially similar facts, another Australian court held a contrary view. There it appeared

[1] Scottish Cooperative Wholesale Society (Ltd.) *v.* Glasgow Fleshers' Trade Defense Association et al., 35 Scottish Law Rep., 645 (1898). An ordinance subsequently passed by the local authority providing that sale rings at the public wharf should not be used for private sales, sales to any limited number of persons, or sales in which any class of the public are excluded from bidding or buying, was held valid by the Court of Sessions, in Scott et al *v.* Magistrates of Glasgow, 36 Scottish Law Rep., 458 (1899).

[2] Long *v.* Larkin et al. (1914), 2 Irish Reps., 285, 329. While this report was on the press the above decision was affirmed by the House of Lords. See Larkin et al. *v.* Long, L. R. (1915), A. C., 814.

[3] Punch *v.* Boyd et al., 16 L. R. (Ireland), 476 (1885).

[4] Taffs *v.* Beesley, 16 Australian Law Times, 59 (Victoria, 1894).

that a retail butchers' association entered into an arrangement with a wholesalers' association, the members of the latter agreeing not to supply retailers who sold below certain fixed prices. The plaintiff, a retail butcher, became a member of the association, but refused to be bound by the prices agreed upon, and as a consequence the wholesalers refused to supply him further with meat. A verdict for the plaintiff was set aside on appeal, the court being of opinion that the defendants were merely acting for the protection of their own interests and not to injure the plaintiff whose legal rights had not been infringed.[1]

Section 12. Intimidation, obstruction, and molestation of competitors or their customers.

In 1914 the Supreme Court of Michigan expressed the opinion that "there are many ways, other than by interference with contract, of harassing, interfering with, and obstructing a competitor in such a manner as to amount to unfair competition, in the broadest sense of the term," and that "the business of another may be unlawfully obtained by harassing his customers and salesmen, just as effectively as by passing off his [sic] goods as those of another."[2] The Supreme Court of Massachusetts has also declared that "no man can justify an interference with another man's business through fraud or misrepresentation, nor by intimidation, obstruction, or molestation"[3] and the courts of a number of other States have used similar expressions.[4] Likewise in England the lord chancellor observed that "intimidation, violence, molestation, or the procuring of people to break their contracts are all of them unlawful acts."[5]

AMERICAN DECISIONS.

The reported cases disclose the fact that these methods have in a few instances been employed to embarrass competitors or drive them out of business. Thus, in Standard Oil Co. *v.* Doyle,[6] where the testimony tended to prove such practices, the court, while conceding that "one man may by fair methods compete with a rival until by sheer force of competition, by underselling or outbidding him, his own business is built up to the detriment and ruin of his rival,"

[1] Rea et al. (defendants) *v.* Buckland (plaintiff), 11 Western Australian Law Reps., 2 (1908).

[2] Attorney General *v.* National Cash Register Co., 148 N. W., 420, 428 (Mich. Sup. Ct., 1914).

[3] Martell *v.* White, 185 Mass., 255, 261 (1904).

[4] Crump *v.* Commonwealth, 84 Va., 927, 940, 941 (1888); Jackson *v.* Stanfield, 137 Ind., 592, 613 (1893); Vegelahn *v.* Guntner, 167 Mass., 92, 99 (1896); Doremus *v.* Hennessy, 176 Ill., 608, 614 (1898); My Maryland Lodge *v.* Adt, 100 Md., 238, 250 (1905); Victor Talking Machine Co. *v.* Lucker, 150 N. W., 790 (Minn. Sup. Ct., 1915).

[5] Mogul Steamship Co. *v.* McGregor, Gow & Co., L. R. (1892), A. C., 25, 37.

[6] 118 Ky., 662, 670 (1904).

declared that a different case is presented where one seeks to destroy the rival's business by unlawful means and that it was most assuredly unlawful to obstruct, harass, and annoy Doyle's employees, to threaten his customers, and to procure his arrest on false charges for the purpose of alienating his patrons.

Somewhat similar methods were disclosed in Spaulding *v.* Evenson,[1] where the Inland Empire Implement & Hardware Dealers' Association and certain of its representatives were temporarily enjoined from—

> preceding or following in close range any employee, agent, or servant of the complainants or the teams used by them or any of them in such manner as to hinder, obstruct, harass, annoy, or intimidate the complainants or any of their employees in the free use of the highway, and from in any other manner occupying said highway in such a manner as to hinder, obstruct, harass, annoy, or intimidate the complainants or any of their employees in the free use thereof; also from approaching or speaking to any actual or supposed customer or customers of the complainants so long as complainants' agents or servants are personally present and engaged in selling or negotiating the sale of any buggy or wagon, for the purpose of defeating such sale by the complainants; also from resorting to any species of intimidation, force, or fraud, or any conduct that would imply intimidation, force, coercion, or fraud, for the purpose of preventing complainants from selling buggies or wagons and carrying on said business of selling buggies or wagons.

Although in this case it was contended that if any damage was sustained by the complainants it was the unavoidable result of competition, the circuit court of appeals expressed the opinion that "the right of competition furnishes no justification for such acts."

Likewise on the complaint of the Economist Furnace Co., certain employees of the Wrought-Iron Range Co. were enjoined from molesting, interrupting, hindering, disturbing or otherwise interfering with, or threatening or intimidating the plaintiff or its agents, and were adjudged guilty of contempt for violating the order of the court.[2] Subsequently in a suit brought by the Drake Hardware Co. in New York, the Wrought-Iron Range Co. and its employees were again enjoined from engaging in similar practices,[3] and more recently in North Carolina a number of its agents were indicted and charged with a conspiracy to break up the business of the St. Louis Steel Range Co. by like methods.[4] In Louisiana a merchant and his employees were enjoined from "inducing, rushing, or crowding" persons from in front of the windows of a competitor into his own store, from representing that plaintiff's store was a portion of the de-

[1] 149 Fed., 913 (C. C., 1906), aff. 150 Fed., 520, 522 (C. C. A., 1907).

[2] Economist Furnace Co. *v.* Wrought-Iron Range Co. et al., 86 Fed., 1010, 1011 (C. C., 1898).

[3] Drake Hardware Co. *v.* Wrought-Iron Range Co., 78 N. Y. Supp., 1114 (Sup. Ct., App. Div., 1902).

[4] State *v.* Dalton et al., 83 S. E., 693 (N. C. Sup. Ct., 1914).

fendant's shop, or in any manner interfering with the plaintiff's employees and customers.[1]

A different method of obstructing the business of a competitor is disclosed in People *v.* Everest et al.,[2] where the defendants were indicted and charged with a conspiracy, among other things, to destroy the business and property of the Buffalo Lubricating Oil Co. The evidence tended to show that a conspiracy was formed of the character charged in the indictment, and that the defendants had induced one of the skilled workmen employed by said corporation purposely to mismanage the stills so as to injure them and lessen their value and to make the process of refining crude petroleum a failure, and had also induced said workman to leave the service of his employers. The defendants were found guilty and fined.

Another unlawful practice appears in Warren Mills *v.* The New Orleans Seed Co.,[3] where it was alleged that the latter company, while conducting its business of buying and crushing cotton seed, distributed several hundred thousand sacks along the railroads and river banks for producers to fill with seed and return, and that the Warren Mills, a competitor, knowingly and continuously used the complainant's sacks notwithstanding its remonstrances, with the result that the complainant failed to obtain as much seed as it would have done but for such improper use of its sacks.

ENGLISH DECISIONS.

A number of English cases disclose similar unlawful practices. Thus, as early as 1620 judgment was entered for a quarryman who complained that the defendant, to discredit and deprive him of the benefit of the quarry, threatened his workmen, and by threats of violence and of litigation induced or coerced his customers to cease buying.[4] Intimidation of customers was disclosed in another early case, where it appeared that the plaintiffs were the owners of a vessel trading on the coast of Africa, and that for the purpose of preventing natives from trading with the plaintiffs' ship, the defendant fired a cannon from his vessel, killing one of the natives, whereby the plaintiffs lost their trade. There was a verdict for the plaintiffs.[5]

It was likewise held actionable for the competitors of an omnibus proprietor to precede and follow his vehicles so as to prevent persons

[1] Gilly *v.* Hirsh, 122 La., 966, 970 (1909).

[2] People *v.* Everest et al., 51 Hun, 19 (N. Y. Sup. Ct., 1889). See full record of this case in H. Rept. 3112, 50th Cong., 1st sess., pp. 801–948.

[3] Warren Mills *v.* New Orleans Seed Co., 65 Miss., 391 (1888). As it appeared that the injury was continuous in its nature and that the separate remedy at law for each trespass would not be adequate to relieve the injured party from the expense, vexation, and oppression of numerous suits against the same wrongdoer in regard to the same subject matter, it was held, on demurrer, that the complainant was entitled to an injunction. Cf. U. S. *v.* Central-West Publishing Co. et al., p. 495.

[4] Garret *v.* Taylor, Cro. Jac., 567 (1620).

[5] Tarleton *v.* McGawley, Peake's N. P., 205 (1793).

from entering them, to drive vehicles so as to injure his horses and omnibuses and prevent the doors from being opened, to otherwise interfere with persons about to enter his conveyances, and to insult and assault his employees while conducting his business.[1]

In another case it was held actionable for the proprietor of a colliery to place several cartloads of sticks and a tree across the highway for the purpose of obstructing the entrance to an adjoining colliery and diverting its customers.[2]

Similarly it has been held actionable for a railway company to obstruct a siding connecting its line with another's wharf, for the purpose of diverting trade to its own,[3] or for a like purpose to obstruct one of the entrances to a station belonging to a rival line.[4]

A different method of interfering with the business of a competitor was before the court in 1719, when several persons concerned in the making of cards were indicted for a conspiracy to ruin the trade of the King's card maker, and it was shown that they had on several occasions paid his apprentices to put grease into the paste, thus spoiling the cards. Chief Justice Pratt, being of the opinion that there was evidence of a conspiracy, directed the jury accordingly.[5]

Section 13. Exclusive dealing.

Contracts for exclusive dealing, though at the present time regarded by many as being in restraint of trade, are uniformly upheld at common law, unless unreasonably restrictive in character, the same test being used in determining their validity as is applied to other contracts in restraint of trade. Accordingly, contracts of this nature which afford only a fair measure of protection to the interests of the party for whose benefit they are made without being so extensive in their operation as to interfere with the interests of the public, are valid and enforceable. The prevailing view of the courts appears to be that the chief effect of such a contract is to increase the trade of the parties thereto and that any resulting restriction of competition is merely incidental.

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[1] Green *v.* The London General Omnibus Co., 7 C. B. (N. S.), 290 (1859).

[2] Iveson *v.* Moore, 1 Ld. Raymond, 486 (1699); 1 comyns, 58; 12 Mod., 262; Cf. Rose et al. *v.* Miles, 4 M. & Selw., 101 (1815).

[3] Bell *v.* Midland Ry. Co., 10 C. B. 287 (1861).

[4] London & North Western Railway Co. *v.* Lancashire & Yorkshire Railway Co., L. R. (1867), 4 Eq., 174.

[5] Rex. *v.* Cope et al., 1 Strange, 144 (1719). See also Kinkead, Reid & Co. *v.* The Johannesburg Chamber of Mines, Official Reports, High Court, South African Republic, 139 (1894), where the plaintiff, who supplied laborers to mining companies, complained that an agent of the Johannesburg Chamber of Mines, who desired to secure for himself the exclusive business of supplying the mines with laborers, took a body of Kafirs from the plaintiff's agent and lodged them under the charge of the police. It appearing that the plaintiff had been informed that such acts would be continued so long as he continued to import natives, the court restrained the defendant from further interference with the plaintiff's business.

While the view is held by some that contracts for exclusive patronage necessarily eliminate or prevent competition in that all of the dealers in a given line may be thus bound to handle the goods of a single manufacturer, few actions for damages appear to have been brought against those practicing this policy of exclusion. Whether such contracts are regarded by the courts as in restraint of trade, or as otherwise unlawful, must therefore be chiefly determined from cases arising between the parties to such contracts.

AMERICAN DECISIONS.

CONTRACTS TO BUY FROM OR DEAL EXCLUSIVELY IN THE GOODS OF ONE PERSON.—The validity of contracts by which one of the parties agrees to buy exclusively from or to deal only in the goods of the other has been questioned in many cases. The weight of authority appears to be that contracts of this character are valid at the common law. In one of the earliest American cases on the subject, decided by the Supreme Court of Massachusetts in 1825, a contract was held valid where one of the parties agreed, in connection with the sale of his business, to give the other all of his freighting up and down the Connecticut River in consideration of a covenant by the latter to handle such freight at the usual rates.[1] And where one of the parties to a contract agreed to purchase certain building materials exclusively from the other for a period of five years, the agreement was held valid and damages awarded for a failure to observe its terms.[2] Similarly the Supreme Court of Oklahoma recently held that an agreement of a retail dealer to purchase his entire supply of wall paper from a certain wholesaler was valid, and that the latter could recover for the goods sold pursuant to the contract.[3] So also a contract by which one of the parties agreed to deal exclusively in sewing machines and accessories made by the other was held valid and enforceable by the Illinois Supreme Court in 1875.[4] And where a manufacturer of paper patterns agreed to furnish them to a dealer for two years, upon condition that the latter would not sell nor allow to be

[1] Palmer *v.* Stebbins et al., 3 Pick., 188 (1825).

[2] Trentman et al. *v.* Wahrenburg et al., 65 N. E., 1057 (Ind. App. Ct., 1903).

[3] J. W. Ripy & Son *v.* Art Wall Paper Mills, 136 Pac., 1080 (Oklahoma Sup. Ct., 1913). Per Brewer, Commissioner: "It seems to us that the effect of this agreement, when all of its terms are considered, is to promote and foster the trade of both parties rather than otherwise. The contract does not undertake to fix the price at which defendants might sell the goods. It does not restrict the plaintiff from selling its goods to others, nor does it restrict either party from selling goods to any other person or class of persons. The parties themselves are not competitors, nor does the contract affect the competitors of the defendants, nor can we see wherein it could injuriously affect the public. * * * A contract between individuals the main purpose and effect of which is to promote, advance, and increase the business of those making it will not be held to be in restraint of trade and commerce merely because its operations might possibly, in some slight or theoretical way, incidentally and indirectly restrict such trade and commerce."

[4] Brown *v.* Rounsavell, 78 Ill., 589 (1875).

sold in his store, any other make of paper patterns, an injunction was granted restraining the dealer from selling patterns of any other make during the life of the contract.[1] Substantially similar contracts for exclusive purchasing or dealing have been upheld in many other cases.[2] Upon like principles covenants or conditions in leases to the effect that the lessee shall sell only beer of the lessor's manufacture on the leased premises have been generally upheld. Thus the Supreme Court of Indiana has held that such a covenant was not void as being against public policy and granted an injunction restraining the lessee from violating the agreement.[3]

In the same way contracts to sell exclusively to one person are upheld. For example, where one of the parties to a contract, in consideration of a covenant by another to purchase a given amount of peppermint oil from him, agreed not to sell such oil to anyone else and not to distill any such oil for anyone not under contract to sell to the other contracting party, the court held the agreement to be only in partial restraint of trade and therefore valid.[4] And a contract whereby one of the parties agreed to purchase all sash weights manufactured by the other was held valid.[5] So, also, a contract by a manufacturer to sell garments of a certain design or pattern exclusively to one firm has been held to be only in partial restraint of trade and valid.[6] Similarly, the California Supreme Court held that a contract whereby one party bound himself to manufacture a specified number of barrels of lime for the other within a given time, and agreed that during the life of the contract he would not sell lime to any other person, was not illegal as being in restraint of trade.[7] And a contract by the terms of which one of the parties agreed to buy electric current exclusively from the other for a period of five years has been upheld by the Appellate Court of Indiana.[8] Contracts of this general character have been held valid in a number of other cases.[9]

[1] Standard Fashion Co. *v.* Siegel-Cooper Co., 157 N. Y., 60 (1898). See also Butterick Pub. Co. *v.* Rose, p. 173; Butterick Pub. Co. *v.* Fisher, 203 Mass., 122 (1909).

[2] Heimbuecher *v.* Goff, Horner & Co., 119 Ill. App., 373 (1905); Southern Fire Brick & Clay Co. *v.* Garden City Sand Co. et al., 223 Ill., 616 (1906); Fuller *v.* Hope, 163 Pa. St., 62 (1894); George & Chapman *v.* East Tennessee Coal Co., 15 Lea, 455 (Tenn. Sup. Ct., 1885).

[3] Ferris *v.* American Brewing Co., 155 Ind., 539 (1900). To the same effect see Joseph Schlitz Brewing Co. *v.* Nielsen, 77 Nebr., 868 (1906); Schlitz Brewing Co. *v.* Travi & Corstorta, 179 Ill. App., 269 (1913); Christian Feigenspan *v.* Nizolek, 65 Atl., 703 (N. J. Ch., 1907). But see Muller *v.* Bohringer, 3 Pa. Co. Ct., 144 (1887).

[4] Van Marter *v.* Babcock, 23 Barb., 633 (N. Y. Sup. Ct., 1857).

[5] Over *v.* Byram Foundry Co., 37 Ind. App., 452 (1906).

[6] Blauner et al. *v.* The Williams Co., 36 Misc., 173 (N. Y. Sup. Ct., 1901).

[7] Schwalm *v.* Holmes & Co., 49 Cal., 665 (1875).

[8] Beck et al. *v.* Indianapolis Light & Power Co., 36 Ind. App., 600 (1905).

[9] State ex rel. Berryhill *v.* St. Paul Gas Light Co., 92 Minn., 467 (1904); Long *v.* Towl, 42 Mo., 545 (1868); Clark *v.* Crosby, 37 Vt., 188 (1864); Saddlery Hardware Mfg. Co. *v.* Hillsborough Mills, 68 N. H., 216 (1894). But see Reeves *v.* Decorah Farmers' Cooperative Society, 160 Ia., 194 (1913); Ludewese *v.* Farmers' Mutual Cooperative Co., 164 Ia., 197 (1914).

In like manner where a corporation, with the consent and approval of its stockholders, entered into a contract with an association of sheep brokers whereby it was agreed that the stockholders of the corporation should for a period of three years buy their sheep and lambs exclusively from the association, and that members of the association should during the same period sell sheep and lambs for the New York market to the stockholders of the plaintiff only, and where the stockholders of the corporation subsequently agreed among themselves and with the corporation that each of them should pay to the latter a penalty for each carload of sheep and lambs purchased from a member of the brokers' association as distinguished from the association itself, it was held that the corporation could lawfully collect the penalty from a stockholder who bought from a member of the association in violation of his agreement.[1] But in a more recent case where there was an arrangement of a similar character, coupled with an agreement by the controlling parties to pool their commissions as a means of protecting their business from loss "by unreasonable competition," it was condemned by the New York Court of Appeals as being unlawful.[2]

While contracts between individuals or private corporations for exclusive dealing or patronage are very generally upheld, a different rule is sometimes applied to contracts of certain classes by public-service corporations binding the patrons of such corporations to deal only with them, and to contracts between such corporations for exclusive dealing with each other, though the courts are not agreed as to the validity of these contracts. Where a telephone company contracted to install a telephone exchange in a hotel, the proprietor of the hotel agreeing, among other things, to give the company the exclusive right to place instruments in the hotel, the New York Court of Appeals held the contract void, and denied an injunction restraining the installation of another system in the hotel.[3] A similar contract between a telephone company and a

[1] Live Stock Association *v.* Levy, 54 N. Y. Superior Ct. Reps., 32 (1886).

[2] Judd *v.* Harrington, 139 N. Y., 105 (1893). Per O'Brien, J.: "* * * they (the articles of agreement) manifestly were intended for the purpose of creating a combination between the butchers engaged in buying and the brokers engaged in selling sheep and lambs, in order to control the market, fix the price, and destroy competition. The brokers were to sell only to the butchers, and the butchers to buy only from the brokers. The owners of sheep, or the drovers or consignees who had them for sale, and the public who were interested in the price of meat, as an article of food, might have been prejudiced by the agreement. Whether they were in fact is not material."

[3] Central New York Telephone & Telegraph Co. *v.* Averill et al., 199 N. Y., 128, 138 (1910). Per Bartlett, J.: "While it may, of course, adopt every proper expedient to enlarge its own business, this does not include the right to pursue a policy of exclusion which is distinctly injurious to the public by restricting their circle of communication by telephone. It matters not that the customer may be willing to agree to exclude others or that the contract to do so is supported by a sufficient consideration as between the parties. The evil in such an agreement is its antagonism to the interests of the public. If a telephone company may make a contract of exclusion with one of its customers it may make such a contract with all—and thus preclude all from any telephonic com-

private subscriber was held invalid by the Supreme Court of South Carolina.[1] The same rule appears to be applied by some of the courts to contracts between telephone companies whereby one company agrees to transmit messages only for or over lines of the other party to the contract.[2] For example, where a long-distance telephone company which had just entered the field, made contracts with local telephone companies whereby the latter, which had previously been refused long-distance connection by the company formerly monopolizing the field, agreed to transmit its long-distance messages only over and to receive such messages only from the other party to the contract for a period of 99 years, the contracts were held void as tending to create a monopoly. The fact that as a result of these contracts the public had for the first time been given the benefit of competition in long-distance telephone service was not, in the opinion of the court, sufficient to justify the making of contracts of this character covering such a long period.[3] And in a similar case where a long-distance telephone company entered into a contract with a local company whereby it was agreed that the latter should send its long-distance messages only over the lines of the former and that the long-distance company would give the local company all messages destined for points in a given county, the Supreme Court of Illinois held the contract void.[4] In contrast with the above decision, the Supreme Court of Missouri held that a contract whereby a local telephone company undertook to build an extension of its lines to connect with those of another local line, and under the terms of which each company agreed to transmit over the lines of the other all messages destined to points on such lines, was valid and enforceable, the object of the contract not being to stifle competition but to build up competition against a long-distance line.[5] So also the Supreme Court of Pennsylvania held in 1895 that an

munication with persons who happen to be served by a rival company * * * It is on this broad ground that I think we ought to condemn the exclusive clause of this contract as against public policy and, therefore, void. It tends to nullify the consideration moving to the public for the grant of the franchise, by lessening the sphere of telephonic service; and it is impossible to regard a contract as consistent with public policy which would defeat the very policy that induced the State to bring one of the parties to the contract into existence as a public-service corporation." But see Lough *v.* Outerbridge, 143 N. Y., 271 (1894).

[1] Gwynn *v.* Citizens' Telephone Co., 69 S. C., 434 (1904).

[2] Contracts binding public-service companies to serve one person exclusively, being opposed to the fundamental obligations of such companies to serve all impartially, are clearly invalid. Sammons *v.* Kearney Power & Irrigation Co., 77 Nebr., 580 (1906). The validity of grants of certain classes of exclusive privileges by these companies, however, in connection with the conduct of their business, has been frequently upheld. For the leading cases in the Federal courts see Express Cases, 117 U. S., 1 (1886); Chicago, St. Louis & Northern R. R. Co. *v.* Pullman Southern Car Co., 139 U. S., 79 (1891); Donovan *v.* Pa. Co., 199 U. S., 279 (1905).

[3] U. S. Telephone Co. *v.* Central Union Telephone Co., 202 Fed., 66 (C. C. A., 1913).

[4] Union Trust & Savings Bank of East St. Louis et al. *v.* Kinloch Long Distance Telephone Co., 258 Ill., 202 (1913).

[5] Home Telephone Co. *v.* Sarcoxie Light & Telephone Co., 236 Mo., 114 (1911). See also Cumberland Telephone & Telegraph Co. *v.* State ex rel. Attorney General, 100 Miss., 102 (1911).

agreement by one railroad company to ship all its freight over another's lines was valid and should be enforced by injunction.[1]

Another class of contracts of public-service corporations which has been held invalid in a number of cases is that by which such corporations seek to secure exclusive privileges, such as rights of way, which will protect them from the competition of similar companies. Thus where eminent domain proceedings were instituted to condemn a right of way across a farm for laying gas pipes, and the owner of the land, in defense, claimed that he had given another gas company the exclusive right of laying pipes across his land, it was held that such contract was void since it restricted competition and tended to create a monopoly.[2] In like manner a contract whereby the owner of a large tract of land granted to an oil pipe-line company an exclusive right of way and privilege of constructing oil pipe lines over said land, was held void as an attempt to impose a restraint upon a particular form of trade which the public interests required should not be restrained even partially.[3] A similar ruling was made by the Supreme Court of Minnesota respecting the validity of a contract by the terms of which a landowner gave to a railroad company the exclusive right of way over his property for railway purposes.[4]

CONTRACTS FOR EXCLUSIVE AGENCY OR FOR EXCLUSIVE TERRITORY.—Contracts by which a manufacturer agrees to do business in a certain territory exclusively through one dealer have been upheld in numerous decisions. Thus where a company sold goods upon condition that the purchaser should have an exclusive right to handle its goods in a particular town, but immediately violated the condition by selling the same class of goods to two other dealers in the same town, it was held that the contract was valid, and that the manufacturer could not recover the contract price of the goods sold.[5] Similarly, where a coal mining company sold coal to a dealer under an agreement not to sell at wholesale prices to any other dealer in the same town, the Illinois Supreme Court held that the contract was valid and that the company could recover the purchase price of coal sold under it.[6] Similar contracts have been sustained by the Federal courts,[7] and the courts of Kansas,[8] Massachusetts,[9] California,[10] Nebraska,[11] New Jersey,[12] and the District of Columbia.[13]

[1] Bald Eagle Valley Ry. Co. et al. *v.* Nittany Valley Ry. Co. et al., 171 Pa., 284 (1895).
[2] Calor Oil & Gas Co. *v.* Franzell, 128 Ky., 715 (1908).
[3] West Va. Transportation Co. *v.* Ohio River Pipe Line Co., 22 W. Va., 600 (1883).
[4] Kettle River Ry. Co. *v.* Eastern Ry. Co., 41 Minn., 461 (1889).
[5] Keith *v.* Herchberg Optical Co., 48 Ark., 138 (1886).
[6] Superior Coal Co. *v.* Darlington Lumber Co., 236 Ill., 83 (1908).
[7] Singer Sewing Machine Co. *v.* Union, etc., Co., Holmes (Fed.), 253 (1873).
[8] Roller *v.* Ott, 14 Kans., 609 (1875).
[9] Central Shade Roller Co. *v.* Cushman, 143 Mass., 353 (1887).
[10] Pac. Factor Co. *v.* Adler, 90 Cal., 110 (1891).
[11] Woods *v.* Hart, 50 Nebr., 497 (1897).
[12] New York Trap Rock Co. *v.* Brown et al., 61 N. J. Law, 536 (Sup. Ct., 1898).
[13] Whitson *v.* Col. Phonograph Co., 18 App. D. C., 565 (1901).

Contracts for exclusive territory which contain a corresponding obligation on the part of dealer or agent to sell only the goods of a particular manufacturer have likewise been upheld by the courts. For example, the supreme court of Montana held that a contract for the sale of cigars by the terms of which the purchaser was granted the exclusive right to handle a certain brand of cigars in specified territory upon condition that he would cease to advertise or sell other brands was held valid.[1] And the supreme court of South Carolina has upheld a contract containing similar provisions.[2]

CONTRACTS FOR REBATES IN CONSIDERATION OF EXCLUSIVE DEALING.—A form of contract frequently employed for the purpose of inducing exclusive patronage is that whereby one of the parties offers the other a specified rebate on the purchase price of goods if at the end of a certain period he shall not have dealt in or sold the goods of any other. Under such contracts no obligation rests upon the dealer not to handle the goods of other manufacturers, but if he refrains from doing so he is entitled to the stipulated rebate. In some instances, however, where one of the parties occupies a strong position in an industry or a particular line of business, no rebate is offered, but he simply refuses to sell to those who will not agree to handle his goods exclusively. Contracts of this character have been very generally upheld at the common law. For example, where a manufacturer sold goods to the dealer and offered to rebate a certain proportion of the purchase price if he did not handle similar goods of others, it was held that the sales were valid and that the purchase price could be recovered.[3] Similarly, where a manufacturing company at the close of the year offered a dealer a rebate on his purchases for that year if his requirements for the ensuing year should be purchased from it and the dealer forthwith deducted the amount of the rebate from the last payment for the current year, it was held that defendant could recover the amount deducted, as the right to the rebate did not arise until all of the conditions had been complied with. The court in discussing the offer of the rebate declared that such a contract was not in restraint of trade, and would not have been had it been accepted and performed on the part of the manufacturer.[4] It has also been held

[1] Newell et al. *v.* Meyendorff, 9 Mont., 254 (1890).

[2] Walter A. Wood Mowing & Reaping Co. *v.* Greenwood Hardware Co., 75 S. C., 378 (1906). See also Weiboldt *v.* Standard Fashion Co., 80 Ill. App., 67 (1898); Pick-Williamson Heating & Ventilating Co. *v.* Miller & Harris, 118 S. W., 376 (Ky. Ct. of App. 1909).

[3] National Distilling Co. *v.* Cream City Importing Co., 86 Wis., 352 (1893).

[4] Corn Products Refining Co. *v.* Oriental Candy Co., 168 Ill. App., 585, 590, 591 (1912). Per Duncan, J.: "The proposition of the defendant in error of December 9, 1908, was not illegal. It was made to plaintiff in error after its contract for purchases for the year 1908, which is also legal and binding; and it appears to have been a mere voluntary proposition on the part of defendant in error, without imposing any obligation whatever upon plaintiff in error. It was a mere statement or proposition to give plaintiff in error certain profits on its purchases of 1908, on condition that it do certain things therein named, which plaintiff in error never did do, and which it never was obligated to do, and

that where a company demands exclusive patronage as a condition of doing business with its customers, competitors who as a result of such demands are excluded from any share of the business can not recover damages, though their financial ruin may result therefrom. Thus, where a number of theater owners in various cities organized a corporation to take over their houses, and thereafter the corporation notified the owners of all burlesque shows, suitable to be played at its theaters, that it would not book any show except on condition that it would not play in any theater not owned by the corporation, it was held that a rival theater, which as a result of the action of the new corporation, was unable to book shows and went into the hands of a receiver, could not recover damages, the court being of the opinion that the theater owners were not actuated by malice against the rival theater owner, but that their chief purpose was to advance their own financial interests.[1] A by-law of a press association, however, which required its members not to purchase news from any other association declared by the board of directors of the former to be antagonistic to it, was held void by the Illinois Supreme Court as tending to restrict competition and to create a monopoly.[2] A contrary result respecting the validity of a similar by-law has been reached by the New York and Missouri courts.[3]

ENGLISH DECISIONS.

While at the early common law all contractual restrictions upon one's right to do business were held to be against public policy and unenforceable,[4] the rule has been relaxed and modern English decisions uniformly declare contracts by which a person agrees to deal exclusively with another to be valid. Moreover, it appears to be settled by a comparatively recent decision of the House of Lords that

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was never in any way compelled or urged to do. It was simply a proposition that might have become an obligation on the part of the defendant in error had plaintiff in error seen fit to have accepted its terms and to have performed the conditions upon which it was informed it could have the profits therein named. It is not an illegal contract or contract in restraint of trade, and would not have been, if it had been accepted and performed on the part of plaintiff in error. It was not in any sense a part of the contract for the purchase by plaintiff in error for the year 1908, and in no way affected the validity of that contract. This same proposition, in substance, or so-called contract, was in every way upheld by the Appellate Court of Indiana, in the case of Bessire & Co. *v.* Corn Products Manufacturing Co., 94 N. E., 353."

[1] Roseneau *v.* Empire Circuit Co. et al., 131 N. Y. App. Div., 429 (1909).

[2] Inter-Ocean Publishing Co. *v.* Associated Press, 184 Ill., 438 (1900). See also Minn. Tribune Co. *v.* Associated Press, 83 Fed., 350 (C. C. A., 1897). In a letter from the Attorney General of the United States, dated Mar. 12, 1915, to James M. Beck, counsel for the Sun Printing & Publishing Association of New York, the view is taken that a similar by-law of the Associated Press in so far as it prevents or seriously hinders the members of that association from purchasing or otherwise obtaining news from a rival agency, is in violation of the Sherman law, and should be abrogated.

[3] Matthews *v.* The Associated Press, 136 N. Y., 333 (1893); Bleistein *v.* The Associated Press, 136 N. Y., 662 (1893); State *v.* Associated Press, 159 Mo., 410 (1901); Dunlop's Cable News Co. *v.* Stone, 15 N. Y., Supp. 2 (Sup. Ct., 1891). See also Lloyd Sabaudo *v.* Cubicciotti, 159 Fed., 191 (C. C., 1908).

[4] Standard Oil Co. *v.* United States, 221 U. S., 1, 51 (1911).

third parties, whose field of operation may be restricted as a result of such contracts entered into by other competitors, can not recover damages where the object of the contracting parties is to increase their business, and there appears to be no express intent to injure the business of another.

CONTRACTS TO BUY FROM OR DEAL EXCLUSIVELY IN THE GOODS OF ONE PERSON.—Among the contracts for exclusive dealing which have come before the English courts were those by which the lessors of property to be used for public houses require the lessees to sell beer and other beverages of the lessors' manufacture to the exclusion of all others. While in several early cases the courts appear to have regarded these covenants for exclusive dealing with disfavor,[1] they apparently were not held invalid, and subsequent cases clearly hold them to be lawful and enforceable.[2] The same principle has been applied to sales of lands with similar covenants by the purchaser. Thus, where land was sold to a freehold society which covenanted with the vendor that he should have the exclusive right to supply beer to any public house erected on the land, and one of the members of the society, himself a brewer, acquired a portion of the land on which he erected a public house which he supplied with his own beer, it was held that an injunction should issue to restrain the breach of the covenant.[3] The court was of opinion in this case that the covenant was not void for uncertainty or want of mutuality, or as being in unreasonable restraint of trade, or because it purported to be perpetual. Similarly, where a lease of a public house contained a covenant that the lessee and his assigns would, during the continuance of the lease, purchase all beer, porter, etc., sold or consumed on the premises from the lessor, and contained also a provision that so long as the lessee should purchase all beer from the lessor the latter would accept one-half of the yearly rental specified in the lease as full satisfaction of the rent, it was held that the lessee must purchase all beer from the lessor and that he did not have the alternative of purchasing elsewhere and paying the full rental.[4]

In the same way, contracts to purchase exclusively from one person or to sell all of one's supply of an article to another are upheld. For example, it has been held that a contract to take all the electrical energy required on one's premises from a given company for a period of not less than five years is valid and enforceable, and an injunction issued which restrained the party "from taking electrical energy

[1] Cooper *v.* Twibill, 3 Camp., 285 n. (1808); Thornton *v.* Sherratt, 8 Taunt., 529 (1818).

[2] 18 Halsbury's Laws of England, 573.

[3] Catt *v.* Tourle, L. R. (1869), 4 Ch. App., 654.

[4] Hanbury *v.* Cundy, 58 Law Times Reps., 155 (1887). See also Courage & Co. *v.* Carpenter, L. R. (1910), 1 Ch. Div., 262 (decided in 1909); Noakes & Co. (Ltd.) *v.* Day, L. R. (1910), 1 Ch. Div., 270 (decided in 1907).

required for his premises from any person other than the plaintiff."[1] Similarly, where the owner of a building rented a stall to another and agreed that the tenant should have the exclusive right to exhibit and sell certain specified classes of goods in the building, but failed to prevent others from so doing, an injunction was granted restraining the owner from violating the agreement.[2] In a recent opinion of the Privy Council it appears, though the point was not decided, that the court regarded contracts by which one of the parties agrees to purchase only from the other and the latter covenants to sell only to the former for resale in specified territory as not invalid at the common law. In that case certain colliery proprietors agreed to sell certain steamship companies all the coal that they might require to supply the trade of several Australian States, and not to sell coal for consumption in those States except to the shipping company or their nominees, and the latter agreed to buy from the collieries all the coal they might require for their interstate trade and not carry any other coal. The court was of opinion that such an agreement was not necessarily unreasonable or injurious to the public.[3]

Contracts or leases binding the purchaser or lessee to use only articles of the vendor's or lessor's manufacture in connection with the articles sold or leased have also been upheld by the English courts. A striking example is afforded by the case of United Shoe Machinery Co. of Canada *v.* Brunet, decided by the English Privy Council in 1909. In that case the company making machinery used in the manufacture of shoes leased certain machines to a company, the lease containing a clause to the effect that the lessee should not use, in connection with the lessor's machines, any machines obtained from other manufacturers. Upon the lessee installing machines of another manufacturer suit for an injunction and damages was instituted, and it was held that the lessor was entitled to an injunction restraining the lessee from using the machines in conjunction with the machines obtained from others and to damages, the view being taken that the

[1] Metropolitan Electric Supply Co. *v.* Ginder, L. R. (1901), 2 Ch., 799.

[2] Altman *v.* Royal Aquarium Society, L. R., 3 Ch. Div., 228 (1876).

[3] Attorney General of Australia *v.* Adelaide Steamship Co. (Ltd.) et al., L. R. (1913), A. C. (Privy Council), 781, 812. Per Lord Parker of Waddington: "Similar provisions are quite common in contracts of exclusive agency, and, in their Lordships' opinion, are not necessarily unreasonable or injurious to the public. There is no evidence that the tonnage of the shipping companies was more than sufficient for their inter-State trade in coal, or that the effect of the agreement was to render their vessels idle. Of course the agreement precluded colliery proprietors not parties thereto from being able to avail themselves of these vessels. But a similar result follows whenever vessels are chartered by a single person or by a group of persons. The shipping companies were not the only persons engaged in the shipping trade in coal; they owned only about the same proportion of the total tonnage engaged in the Newcastle inter-state coal trade as the proportion of such trade represented by the parties to the vend agreement. So far as other colliery proprietors were concerned they were not by reason of the shipping agreement in any worse position than they would have been had the parties to the vend chartered all the vessels of the shipping companies, and, having regard to the exigencies of the inter-State trade, such action on the part of the parties to the vend would have been quite reasonable."

plaintiff had the right to refuse to lease its machines altogether or to lease them on whatever terms best promoted its own interests.[1]

The same principles have been applied to licenses of patented articles. Thus, where the patentee of an invention for improvements in slubbing machines granted to another a license to use the invention during the life of the patent, the licensee agreeing not to make or sell any machines without the invention attached to them, it was held that the agreement was valid, notwithstanding the licensee's plea that the invention had become worthless.[2]

CONTRACTS FOR REBATES IN CONSIDERATION OF EXCLUSIVE DEALING.—The practice of giving rebates to customers as an inducement for exclusive patronage was declared a lawful and legitimate form of competition by the House of Lords in Mogul Steamship Co. *v.* McGregor, Gow & Co.[3] In that case the members of a so-called conference of shipowners offered a rebate of 5 per cent to all shippers who confined their shipments of tea and general cargo from China to Europe to members of the conference. A rival line which had been excluded from the conference sought damages and an injunction to restrain the continuance of this practice, but the House of Lords held, affirming the decision of the court of appeal, that since the action of the members of the conference was taken with the lawful object of protecting and extending their trade and increasing their profits and since no unlawful means had been employed the plaintiff had no right of action.[4] And where a tobacco company offered a rebate of 6 per cent to all dealers who handled defendant's cigarettes exclusively it was held that the making of such contracts was not

[1] United Shoe Machinery Co. of Canada *v.* Brunet, L. R. (1909), A. C., 330, 342, 343. Per Lord Atkinson: "By virtue of the privilege which the law secures to all traders, namely, that they shall be left free to have their own trade in the manner which they deem best for their own interests, so long as that manner is not in itself illegal, the respondents are at liberty to hire or not to hire the appellants' machines, as they choose, irrespective altogether of the injury their refusal to deal may inflict on others. The same privilege entitles the appellants to dispose of the products they manufacture on any terms not in themselves illegal, or not to dispose of their products at all, as they may deem best in their own interest, irrespective of the like consequences. This privilege is, indeed, the very essence of that freedom of trade in the name and in the interest of which the respondents claim to escape from the obligations of their contracts."

See p. 539 for English and Colonial statutes expressly declaring agreements of this character to be in restraint of trade.

[2] Jones *v.* Lees, 1. H. & N., 189 (1856). See also Printing & Numerical Registering Co. *v.* Sampson, L. R. (1875), 19 Equity, 462.

[3] L. R. (1892), 1 A. C., 25.

[4] Per Halsbury, L. C.: "I have been unable to discover anything done by the members of the associated body of traders other than an offer of reduced freights to persons who would deal exclusively with them; and if this is unlawful it seems to me that the greater part of commercial dealings, where there is rivalry in trade, must be equally unlawful."

Per Lord Watson: "There is nothing in the evidence to suggest that the parties to the agreement had any other object in view than that of defending their carrying-trade during the tea season against the encroachments of the appellants and other competitors, and of attracting to themselves custom which might otherwise have been carried off by these competitors. That is an object which is strenuously pursued by merchants great and small in every branch of commerce; and it is in the eye of the law, perfectly legitimate."

Per Lord Hannen: "The objects sought and the means used by the defendants did not exceed the limits of allowable trade competition, and I know of no restriction imposed by law on competition by one trader with another, with the sole object of benefiting himself."

unlawful at the common law, the court being of opinion that contracts of this character amounted to no more than ordinary competition.[1]

CONTRACTS FOR EXCLUSIVE AGENCY.—Contracts for exclusive agency appear to have been upheld by the English House of Lords in Mogul Steamship Co. *v.* McGregor, Gow & Co.,[2] where it was alleged, among other things, that the defendant companies, as members of a conference of steamship owners, had, in pursuance of their purpose to secure a monopoly of the tea-carrying trade between China and England, prohibited their agents from being interested in competitive steamers or from loading sailing vessels for others than members of the conference. Three of the lords writing opinions in this case declared it lawful for the steamship companies to thus prohibit their agents from serving others in a like capacity.

Section 14. Bribery of employees.

A common method of competition is the giving of secret commissions to another's employees for the purpose of securing preferential treatment in the distribution of the employer's patronage. It is fair to assume that in many cases the commission is demanded by the employee himself, who thus obliges the dealer to become a party to an illegal transaction or to abandon the business to a less scrupulous competitor. The practice of giving and demanding bribes has been described as "unfair, unjust and improper," and "a particularly hateful and demoralizing phase of unfair competition,"[3] and it has been denounced alike by the courts, legislative bodies, and commercial organizations. Notwithstanding the fact that the courts have permitted the principal to recover the amount of the commissions so received,[4] to discharge an employee receiving them,[5] and to repudiate contracts made under such circumstances,[6] it has been considered necessary in several States,[7] as well as in England and a number of the English colonies,[8] to further discourage this practice by making it a criminal offense.

AMERICAN DECISIONS.

In a comparatively recent case the Supreme Court held that the United States was entitled to a decree against an Army officer for

[1] Queen *v.* American Tobacco Co. of Canada, 3 La Revue de Jurisprudence, 453 (1897). See also Graham *v.* J. I. Case Threshing Machine Co., 19 Man., 27 (1909).

[2] L. R. (1892), A. C., 25, 43, 50.

[3] Australian (Commonwealth) Debates, 1905, Vol. XXV, p. 495.

[4] United States *v.* Carter, 217 U. S., 286 (1910).

[5] Swale *v.* Ipswich Tannery, 11 Commercial Cases (Mathew), 88 (1906); Wade *v.* William Barr Dry Goods Co., 155 Mo. App., 405 (1911).

[6] City of Findlay *v.* Pertz et al., 66 Fed., 427 (C. C. A., 1895); Alger *v.* Keith et al., 105 Fed., 105 (C. C. A., 1900); Panama & South Pacific Telegraph Co. *v.* Indiarubber, G. P., & T. Works Co., 32 Law Times Reps., 517 (1875).

[7] See p. 504.

[8] See p. 534.

a sum of money representing secret profits resulting from contracts over which he had control, and to enforce such decree against any of his property, including property in the hands of third parties having knowledge of how the money was obtained, and this, irrespective of whether the Government was able to show any specific abuse of discretion, or that it had suffered any actual loss.[1] In another case the circuit court of appeals held that a municipality was entitled to rescind a contract for separators used on natural-gas wells, where it was shown that the manufacturers agreed to allow the superintendent of the gas works a commission on each separator purchased.[2] And in a suit by an employee against his employer, based on an alleged wrongful dismissal, where it appeared that while acting as buyer for his employer's toy department he had regularly received secret gifts and gratuities from a firm from which he purchased toys, it was held that such conduct justified his discharge.[3]

ENGLISH DECISIONS.

There are a number of English cases involving the payment of secret commissions or bribes to the agents and employees of another, as a reward for having done some act in relation to their principal's business, in most cases for favoring the briber in the purchase of goods for their employer. The courts have vigorously condemned the practice and in all such cases have permitted a recovery of the amount so paid. Thus where a merchant who supplied coal to a municipal gas works paid a secret commission of 1s. per ton to the manager of the plant, the city was held entitled to recover from the merchant the amount of the loss sustained by reason of having paid an increased price for the coal;[4] and in another case where it appeared that a firm of wholesale tobacconists had, during a period of years, paid the plaintiffs' buyers the sum of £700 in secret commissions, the court permited the recovery of that amount from the wholesalers, although the jury had found that the prices at which

[1] United States *v.* Carter, 217 U. S., 286 (1910).

[2] City of Findlay *v.* Pertz et al., 66 Fed., 427, 435 (C. C. A., 1895). Per Lurton, Circuit Judge: "Such arrangements are a fruitful source of public extravagance and peculation. The conflict created between duty and interest is utterly vicious, unspeakably pernicious, and an unmixed evil. Justice, morality, and public policy unite in condemning such contracts, and no court will tolerate any suit for their enforcement."

[3] Wade *v.* William Barr Dry Goods Co., 155 Mo. App., 405 (1911). Per Caulfield, J.: "Any conduct upon plaintiff's part involving lack of fidelity or reasonably calculated to destroy the confidence of a reasonable employer under such an employment would be inconsistent with plaintiff's continuing as buyer for the defendant and justify his discharge, whether the misconduct caused defendant to suffer actual loss or not."

[4] The Mayor, Aldermen, and Burgesses of the Borough of Salford *v.* Lever, L. R. (1891), 1 Q. B., 168 (Ct. of App.).

the tobacco had been sold were not in fact excessive.[1] A similar method of selling tobacco was disclosed in an action brought against a firm which had paid a secret commission, and against the buyer who had accepted the bribe. There it was held that the plaintiff was entitled to recover the amount from either of the defendants, and this, regardless of whether a different price would have been obtained if there had been no bargain for a commission.[2]

In another case it appeared that the buyer of a large cutlery firm was paid commissions regularly by a manufacturer from whom he purchased.[3] The commissions were recovered from the manufacturer in an action brought before the lord chief justice, who expressed the opinion that the practice was "dishonest to the fair trader," and "dishonest to the fair employer;" that "it was unnecessary to point out how the evils worked; they operated to the detriment of the honest trader who was above such nefarious practices."[4]

[1] Hovenden & Sons *v.* Millhoff, 83 Law Times Reps., 41, 43 (Ct. of App., 1900). Per Romer, L. J.: "If a gift be made to a confidential agent with the view of inducing the agent to act in favor of the donor in relation to transactions between the donor and the agent's principal and that gift is secret as between the donor and the agent—that is to say, without the knowledge and consent of the principal—then the gift is a bribe in the view of the law. If a bribe be once established to the court's satisfaction, then certain rules apply. Amongst them the following are now established, and, in my opinion, rightly established, in the interests of morality with the view of discouraging the practice of bribery. First, the court will not inquire into the donor's motive in giving the bribe, nor allow evidence to be gone into as to the motive. Secondly, the court will presume in favor of the principal and as against the briber and the agent bribed, that the agent was influenced by the bribe; and this presumption is irrebuttable. Thirdly, if the agent be a confidential buyer of goods for his principal from the briber, the court will assume as against the briber that the true price of the goods as between him and the purchaser must be taken to be less than the price paid to, or charged by, the vendor by, at any rate, the amount or value of the bribe. If the purchaser alleges loss or damage beyond this, he must prove it. As to the above assumption, we need not determine now whether it could in any case be rebutted. As at present advised, I think in the interests of morality, the assumption should be held an irrebuttable one; but we need not finally decide this, because in the present case there is nothing to rebut the presumption."

[2] Cohen *v.* Kuschke & Co. and Koenig, 16 Times Law Reps., 489 (Q. B. Div., 1900).

[3] Statement of Lord Russell of Killowen, Parliamentary Debates, Apr. 20, 1899, p. 20. And see Hippisley *v.* Knee Bros., L. R. (1905), 1 K. B., 1, 7, where Lord Chief Justice Alverstone observed: "Unfortunately there appears to prevail in commercial circles in which perfectly honourable men desire to play an honourable part an extraordinary laxity in the view taken of the earning of secret profits by agents. The sooner it is recognized that such secret profits ought to be disapproved of by men in an honourable profession, the better it will be for commerce in all its branches."

[4] Oetzmann & Co. *v.* Long & Co., London Times, July 7, 1896, pp. 2–3. The benefits derived from suits of this character are indicated by the following excerpt from a statement made by Mr. Oetzmann, plaintiff in the above case: "My firm have had some experience in recovering sums of money from manufacturers and others. The most notorious case we had was Oetzmann *v.* Long. We had, however, found out others before that case. We compromised one case in which we recovered about £15, sums paid to our then late buyer. In Long's case we recovered about £120 and a considerable sum more as damages and costs. After Long's case we took up one or two others, in one of which we got £120 before the issue of the writ, and in the other case we recovered £300 after the issue of the writ with full costs, but that does not represent anything like the benefit we have received. We have benefited immensely by being able to buy cheaper. Immediately after Long's case we had many manufacturers calling upon us, some of whom we knew before, others of whom were more or less unknown, but who all said, now there is a chance of their doing business with us." (Report from the special committee on secret commissions to the council of the London Chamber of Commerce (July, 1898), p. 5.)

In another case, where the manager of a tannery received secret commissions from an insurance company on insurance placed on his employer's property, it was held that they were entitled to discharge him without notice although his contract of service had not expired.[1]

Although it has been held actionable to receive secret commissions, the court of appeal has ruled that the injured party can not follow money so paid into the investments thereof nor restrain the party from dealing with such investments.[2]

It has likewise been held actionable to bribe another's employee to divulge confidential information respecting his employer's business. Thus a grain merchant recovered damages from a competitor who had bribed a clerk to give him information respecting the names of the plaintiff's customers and his contracts.[3]

Section 15. Competing with purchaser after sale of business and good will.

Not infrequently purchases have been made of an established business, including the good will,[4] without any express agreement by the vendor not to compete in the same line of business with the purchaser. The same situation sometimes arises in connection with the sale of the practice of a professional man. In such cases the vendor has sometimes reentered the business or profession in competition with the purchaser, and the courts have been called upon to determine how far, if at all, the purchaser is entitled to be protected from the competition thus thrust upon him. The American courts are not in accord regarding the relief which should be afforded in such cases.

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[1] Swale *v.* Ipswich Tannery, 11 Commercial Cases (Mathew), 88 (1906).

[2] Lister & Co. *v.* Stubbs, L. R. (1890), 45 Ch. Div., 1, and see Powell & Thomas *v.* Evan Jones & Co., L. R. (1905), 1 K. B., 11. Cf. U. S. *v.* Carter, P. 421.

[3] Hamlyn *v.* John Houston & Co., L. R. (1903), 1 K. B., 81. Since 1906 the bribery of another's employees has been a criminal offense in England. See p. 534. See also Rex *v.* Whitaker, L. R. (1914), 3 K. B., 1283, where the commanding officer of a regiment was found guilty of bribery and of conspiracy to bribe. It appeared that representatives of Lipton (Ltd.) had paid the appellant to induce him to show them favor in relation to certain canteen contracts. In the House of Lords it was stated on behalf of the Government that "on June 15 the War Office addressed a letter to the General Officers Commanding-in-Chief of all the districts, intimating that no contracts were under any circumstances to be entered into with the firm of Lipton's, Limited, and steps were to be taken for all contracts now held by this firm to be terminated as soon as possible * * *." On November 26, 1914, an inquiry was made whether there was any present intention of reinstating their name upon the list of firms eligible for army contracts. The reply was in the negative. (Great Britain Parliamentary Debates, H. L., July 27, and Nov. 26, 1914.)

[4] Good will was early defined by Lord Eldon as follows: "The good will which has been the subject of sale is nothing more than the probability that the old customers will resort to the old place." Cruttwell *v.* Lye, 17 Vesey, 335, 346 (1810). The English courts have recognized in late years that this definition is entirely too narrow to cover good will under changed commercial conditions. Lord Herschell said of this definition: "If the language of Lord Eldon is to be taken as a definition of good will of general application, I think it is far too narrow, and I am not satisfied that it was intended by Lord Eldon as an exhaustive definition." Trego *v.* Hunt, L. R. (1896), A. C., 7, 17. And Lord Macnaghten said: "Generally speaking, it [good will] means much more than what Lord Eldon took it to mean in the particular case actually before him in Cruttwell *v.* Lye. * * * Often it happens that the good will is the very sap and life of the business, without which the

AMERICAN DECISIONS.

THE GENERAL RULE WITH RESPECT TO REENTERING THE BUSINESS.—The general rule is that the vendor of a business, including the good will thereof, may, in the absence of express contract to the contrary, reenter the same line of business, in the same locality, in competition with the purchaser. Thus, where one of the members of a partnership engaged in the manufacture of printing presses purchased his partner's interest in the assets and good will of the business it was held that he could not restrain the vendor from setting up a competing business.[1] Similarly, it has been held that one who purchased his partner's interest in a confectionery factory was not entitled to an injunction restraining the vendor from engaging in a similar business in the same town.[2] And where the manager of the New York branch of a Paris house bought the business and good will and frequently thereafter referred to his business by the name of the Paris firm only, it was held that he could not prevent the successors of the latter concern from opening a branch in New York and using the name of the old firm in connection with their business.[3] A number of other opinions are in accord with those set forth above regarding the right of a vendor merely to establish himself in business in competition with the purchaser.[4]

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business would yield little or no fruit. It is the whole advantage, whatever it may be, of the reputation and connection of the firm, which may have been built up by years of honest work or gained by lavish expenditure of money." Trego *v.* Hunt L. R. (1896), A. C., 7, 23, 24. Wood, vice chancellor, in Churton *v.* Douglas, 1 Johnson's Chancery Reps., 174, 188 (High Court of Chancery, 1859), said: "Good will, I apprehend, must mean every advantage—every positive advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself—that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business." The Supreme Court of Wisconsin, in Rowell *v.* Rowell, 122 Wis., 1, 17–18 (1904), observed: "Just what 'good will' includes is not easy of definition. Nay, it varies with the customs of the general trade and the character or methods of the particular business. An early definition by Lord Eldon is 'the probability that the old customers will resort to the old place.' This involved the ancient idea that good will inhered in the premises where the business was conducted, which had some justification when considering an inn, tavern, or theater, as in most of the early cases. This, however, is too limited for modern kinds or methods of business. The habit of people to purchase from a certain dealer or manufacturer, which is the foundation for any expectation that purchases will continue, may depend on many things besides place. Confidence in the quality of the goods, in the facilities of the establishment to fill orders promptly, or in the personal integrity or skill of a dealer or manufacturer, familiarity of the public with a designating name for the product, and probably many other circumstances, might be mentioned as illustrative. The good will is a sort of beaten pathway from the seller to the buyer, usually established and made easy of passage by years of effort and expense in advertising, solicitation, and recommendation by traveling agents, exhibition tests or displays of goods, often by acquaintance with local dealers who enjoy confidence of their own neighbors, and the like."

[1] Cottrell *v.* Babcock Printing Press Mfg. Co., 54 Conn., 122 (1886).

[2] White *v.* Trowbridge, 216 Pa. St., 11 (1906).

[3] Knoedler et al. *v.* Broussod et al., 47 Fed., 465 (C. C., 1891); affd., 55 Fed., 895 (C. C. A., 1893).

[4] Ranft *v.* Relmers, 200 Ill., 386 (1902); Williams *v.* Farrand, 88 Mich., 473 (1891); Von Bremen *v.* MacMonnies, 200 N. Y., 41 (1910); Snyder Pasteurized Milk Co. *v.* Burton, 80 N. J. Eq., 185 (Ct. of Err. and App., 1912); Faust *v.* Rohr, 81 S. E., 1096 (N. C. Sup. Ct., 1914); Wessell et al. *v.* Havens et al., 91 Nebr., 426 (1912).

THE MASSACHUSETTS RULE.—A different doctrine is announced by the Massachusetts courts, however, which hold that the vendor of a business, together with its good will, may not set up in competition with the purchaser if by so doing he depreciates the good will which he sold, or, in the language of the courts, if to permit him to do so will be in derogation of his grant of the good will. Under this rule it must be determined on the facts of each particular case whether the new business established by the vendor does lessen the value of the good will for which he has received a valuable consideration. The rule is thus stated in a recent decision of the Supreme Court of Massachusetts:

> In each case where the good will of a business is sold and the vendor sets up a competing business it is a question of fact whether, having regard to the character of the business sold and that set up, the new business does or does not derogate from the grant made by that sale.[1]

And the same court in a subsequent case says:

> In Massachusetts no competing business can be set up if it derogates from the grant of the good will of the old business.[2]

Thus, where one of the partners in a bookstore, one department of which was devoted to books used by or in connection with the Episcopal Church, sold his interest to the other and three years later, in association with others of the Episcopal faith, some of them customers of the old establishment, opened a rival store, an injunction was granted at the instance of the purchaser of the old business restraining the vendor from working for, holding stock in, or otherwise being connected, directly or indirectly, with the competing business.[3] So also it has been held that a company which purchased the business of manufacturing engines used in the manufacture of paper, together with a patent and the good will and trade names connected with the business, could restrain the vendor from manufacturing, selling, or repairing engines similar to those

[1] Old Corner Book Store *v.* Upham et al., 194 Mass., 101, 105 (1907).

[2] Marshall Engine Co. *v.* New Marshall Engine Co. et al., 203 Mass., 410, 422 (1909).

[3] Old Corner Book Store *v.* Upham et al., 194 Mass., 101, 105 (1907). Per Loring, J.: "The good will sold included the good will of a department carried on for at least 36 years, and for the last 30 years under the immediate personal direction and control of the defendant Upham; and that department was a department for the sale of books used in and in connection with the Episcopal church and was the most prominent department or store for the sale of such books in Boston during that period. The business it should be remarked had a limited class of customers, for the customers are of necessity limited to those belonging to or interested in the Episcopal church. The defendant under whose direction this department in the old business was conducted was and is prominent in and among Episcopalians. It was under these circumstances that this defendant sold the good will of the business which included that department. * * *

"The new business is primarily to sell church books to Episcopal church people. It was started at the solicitation of the defendant Upham, who is prominent in Episcopal church circles. Its stockholders are all of them men of the Episcopal church, and its store is within five minutes' walk of the plaintiff's store."

made by the purchaser of the old business.[1] And where a dealer in rubber goods in London, England, sold his business, including the leasehold and the good will, to a Boston company, and the purchaser accounted to the vendor for everything but the good will, for which it refused to pay, it was held that the personal knowledge of the vendor, his experience in the business, and his acquaintance with the probable purchasers, amounted to a good will which might have been used effectively in competition with the purchaser and that having sold it to the purchaser the vendor could not continue to use it, and therefore must be compensated for it.[2] But where an insurance broker sold her business to another, without, however, conveying a right to use the names under which it had been conducted, it was held that the vendor could engage in the insurance business in competition with the purchaser.[3]

Exceptions to the rule that the vendor may reenter the business.— While, as stated above, the rule in States other than Massachusetts is that the vendor may, in the absence of express contract to the contrary, reenter the field in competition with the purchaser, there appears to be an exception made to this rule in the case of the sale of the practice of a professional man. The courts appear to regard the good will of an established professional practice as based almost entirely on the ability, character, and personality of the practitioner, and it has been held in several jurisdictions that the vendor of such a practice will not be permitted to follow his profession in the same community in competition with the purchaser. Thus where a partner in a dental business in Boston sold his interest to another, but subsequently opened an office there and sent out circulars to his former customers announcing the fact, it was held that an injunction should issue restraining him from practicing dentistry in Boston. It was also held that the purchaser of the old business was entitled to damages, since it was proved that the larger part of the former partner's new practice was derived from patients

[1] Marshall Engine Co. *v.* New Marshall Engine Co., 203 Mass., 410, 420, 423, 424 (1909). Per Loring, J.: "If the decree below is to stand it must stand on the ground that the business set up by Marshall under the name of the New Marshall Engine Co. does in fact derogate from the grant made by him in the sale to the plaintiff of the good will of the business sold by him to it. * * *

"The good will of the business of selling engines to reduce pulp to paper is manifestly one not dependent on the place where it is carried on. A paper manufacturer is not concerned where he buys his machinery. What he wants is the best-made machine at the cheapest price. * * * We cannot doubt that the business set up by the defendant is a competing business which injures the rights bought by the plaintiff when it bought the good will of Marshall's business."

[2] Gordon *v.* Knott et al., 199 Mass., 173 (1908). See also Bachelder & Co. *v.* Bachelder, 220 Mass., 42.

[3] Fairfield *v.* Lowry and another, 207 Mass., 352 (1911).

of the old firm.[1] And where a physician purchased the dwelling and medicines of another, who represented that it was a good community for a physician and that he was removing from the State, it was held that the purchaser was entitled to rescind the contract when the vendor returned shortly afterwards and resumed the practice of medicine in competition with him.[2] Similarly the Maryland Court of Appeals enjoined a surgeon-chiropodist who sold her business in Baltimore under the representation that she intended to leave the city and give up the business, from practicing in the locality over which the purchaser's business extended, although this might not cover the entire city.[3] In like manner, where a physician purchased a residence from another who contracted to retire from the practice, it was held that the purchaser could restrain the retiring physician, who resumed the practice after the lapse of a year and a half, from following his profession in the county where the property was located.[4] Expressions are to be found in other decisions which appear to support the doctrine that the sale of the good will of a professional man's practice precludes his resuming the practice in competition with the vendee.[5]

RIGHT OF THE VENDOR TO SOLICIT HIS FORMER CUSTOMERS.—While, with the exceptions already noted, the vendor may set up a similar business in the same community, the courts will enjoin him from soliciting the patronage of customers of the old business. Thus, where one of the partners conducting an importing and commission business in fancy groceries purchased the interest of the other partners, including the good will, the New York Court of Appeals held that an injunction should issue restraining the vendors, when they opened a similar business, from soliciting the trade of the customers of the old firm.[6] And the Supreme Court of Illinois has held that the vendor of a business of manufacturing soft drinks

[1] Foss v. Roby, 195 Mass., 292 (1907). Per Braley, J.: "In a mercantile partnership the sale of the good will conveys an interest in a commercial business, the trade of which may be largely, if not wholly, dependent upon locality, and the right which the vendee acquires under such a purchase is the chance of being able to retain the trade connected with the business where it has been conducted. * * * But in a partnership for the practice of dentistry, the personal qualities of integrity, professional skill and ability attach to and follow the person not the place."

[2] Townsend v. Hurst, 37 Miss., 679 (1859).

[3] Brown v. Benzinger, 118 Md., 29, 36 (1912). Per Pattison, J.: "In some jurisdictions, however, a distinction is made, in the application of the law, between the sale of the good will of a trade or business of a commercial character where the location is an important feature of the business, and the sale of an established practice and good will of a person engaged in a profession or calling where the income therefrom is the immediate or direct result of his labor and skill and where integrity, skill, ability, and other desirable personal qualities follow the person and not the place. In the first of these sales the principle above laid down [that in the absence of an express covenant the vendor of a business can enter a similar business in competition with the vendee] applies while in the latter it does not."

[4] Beatty v. Coble, 142 Ind., 329 (1895).

[5] Yeakley v. Gaston, 111 S. W., 768 (Texas Ct. of Civil Appeals, 1908); Dwight v. Hamilton, 113 Mass., 175 (1873); Warfield v. Booth, 33 Md., 63 (1870).

[6] Von Bremen v. MacMonnies et al., 200 N. Y., 41 (1910).

should be restrained, on reentering the business in competition with the purchaser, from soliciting the custom of those who patronized the business at the time of sale.[1] Similarly, where a grocery and cigar business was sold, and the vendor, together with several former employees, organized a competing company, the Federal circuit court enjoined the new company from soliciting trade from customers of the business which had been sold;[2] and a similar ruling was made by a Federal circuit court in 1910.[3] In like manner where the vendor of a business and good will agreed not to engage in a similar business within 1,000 miles of the city in which the business was located, without the written consent of the purchaser, the court, although refusing to enforce the contract, because it was not shown that an agreement covering such a wide area was necessary, enjoined the vendors from soliciting the trade of the customers of the old business.[4] So, also, the Court of Errors and Appeals of New Jersey held that one who had sold the good will of a milk business, together with the personal property used in connection therewith, should be restrained, when he subsequently engaged in a competing business owned either by himself or his wife, from soliciting the custom of those who, prior to the sale of the property, had been his customers, and from serving any such customers whose business had been secured by solicitation.[5] Similarly, the Supreme Court of Pennsylvania held that one who contracted to sell all of his right, title, and good will in a newspaper route violated his contract by calling on subscribers on the route with a view to inducing them not to buy papers from the purchaser of the route, but to patronize him instead.[6] Decisions in Maryland,[7] Massachusetts,[8] New Jersey,[9] and

[1] Ranft *v.* Reimers, 200 Ill., 386 (1902).

[2] Acker, Merrall & Condit Co. *v.* McGaw et al., 144 Fed., 864, 865 (C. C., 1906). Per Morris, J.: "It would be a reproach to the law if no adequate remedy could be afforded for the protection of a property so valuable as such a good will against the attacks of the vendor who had sold it, and who afterwards attempts to regain it to the damage of his vendee.

"As the continued patronage of the customers of such a business is what makes the good will of value, and as it is utterly repugnant to the contract by which it was assigned that the vendor should be allowed to seek to regain it by soliciting the customers to come back to him, and as the damage thus inflicted is irreparable and is difficult, if not impossible, in such a business as this to compute, I think a court of equity should not hesitate to grant a remedy by injunction."

[3] Myers *v.* Tuttle, 183 Fed., 235 (1910).

[4] Althen *v.* Vreeland, 36 Atl., 479 (N. J. Ch., 1897).

[5] Snyder Pasteurized Milk Co. *v.* Burton, 80 N. J. Eq., 185 (Ct. of Errors and Appeals, 1912).

[6] Wentzel *v.* Barbin, 189 Pa. St., 502 (1899). Per Curiam: "When the defendant agreed to sell to the plaintiff 'all his right, title and good will to the Oakland paper route, until now, controlled by the said R. M. Barbin,' he became bound in honor and in law to carry out his contract in good faith. He was certainly not at liberty, especially after receiving a large part of the purchase money, to filch away from the plaintiff the veritable substance of that which he had sold. It was not like the setting up of another business of the same kind, but it was the taking away of the very thing he had sold that was complained of by the plaintiff. * * *"

[7] Brown *v.* Renzinger, 118 Md., 29 (1912).

[8] Foss *v.* Roby, 195 Mass., 292 (1907); Fairfield *v.* Lowry et al., 207 Mass., 352 (1911).

[9] Snyder Pasteurized Milk Co. *v.* Burton, 80 N. J. Eq., 185 (Ct. of Errors and Appeals, 1912).

Rhode Island[1] are also to the effect that the vendor should be enjoined from soliciting the patronage of those who were customers of the old business at the time of sale. On the contrary, well-considered opinions in Connecticut,[2] Michigan,[3] and Wisconsin[4] hold that such solicitation will not be enjoined.

In those jurisdictions where the vendor is denied the right to solicit his former customers, the courts have also restrained certain other acts by which the vendor sought to secure the trade of such customers. Thus the Illinois Supreme Court affirmed a decree enjoining the vendor of a business, on opening a competing establishment, from inducing the telephone company to give her the same number which was used by the old establishment, the patrons having been accustomed to send in a large part of their orders over the telephone.[5] A similar ruling was made by the Maryland Court of Appeals,[6] and an injunction restraining the use of a cable address of the old firm was recently affirmed by the New York Court of Appeals.[7]

ENGLISH DECISIONS.

It appears to be well settled in England that the vendor of a business and its good will is at liberty, in the absence of express contract to the contrary, to set up a competing business.[8] There appears to be no case decided contrary to this rule, and the decisions of the Massachusetts courts enjoining the vendor from setting up a competing business where, having regard to the facts of the particular case, it would derogate from the grant, have apparently no support in the decisions of the English courts. The general rule, however, that the vendor may reenter the business in competition with the purchaser is apparently qualified by the further rule that, while he may do this, he will not be allowed privately by letter, personally, or by traveler to solicit any person who was prior to the sale of the good will a customer of the old firm. This limitation was clearly established for the first time in 1872, when it was held that one of the vendors of a brewery business, together with the good will and the right to use the old company name, should be restrained, on establishing a competing business, from soliciting the patronage of those who were

[1] Zanturjian *v.* Boornazian, 25 R. I., 151 (1903).
[2] Cottrell *v.* Babcock Printing Press Co., 54 Conn., 122 (1886).
[3] Williams *v.* Farrand, 88 Mich., 473 (1891). But see Myers *v.* Kalamazoo Buggy Co., 54 Mich., 215 (1884).
[4] Fish Bros. Wagon Co. *v.* La Belle Wagon Works, 82 Wis., 546 (1892).
[5] Ranft *v.* Reimers, 200 Ill., 386 (1902).
[6] Brown *v.* Benzinger, 118 Md., 29 (1912).
[7] Von Bremen *v.* MacMonnies, 200 N. Y., 41 (1910).
[8] Labouchere *v.* Dawson, L. R. (1871), 13 Eq., 322; Trego *v.* Hunt, L. R. (1896), A. C., 7; Jennings *v.* Jennings, L. R. (1898), 1 Ch., 378; Gillingham *v.* Beddow, 69 L. J. Ch., 527 (1900).

customers of the firm at the time of the sale.[1] This case was approved and followed by the English courts until 1884,[2] when it was overruled by the court of appeal on the ground that it was wrongly decided and went much beyond any previously decided case.[3] The question involved in this case did not reach the House of Lords until 1895, when that tribunal reestablished the old doctrine and held that where, by the terms of the articles of partnership, a retiring partner had no interest in the good will of a business, he, his partners, servants, and agents should be restrained from soliciting the trade of any person who was, prior to the dissolution of the partnership, a customer of the old firm.[4]

The decision of the House of Lords in this case has been closely adhered to by the English courts.[5]

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[1] Labourchere *v.* Dawson, L. R. (1871), 13 Eq., 322, 324, 325. Per Lord Romilly, M. R.: "The sale of the business did not prevent him from carrying on the same business in the same place or at Burton, which is a considerable distance off. But the question is this: Was he entitled to solicit personally the customers of the old firm to come and deal with him? * * * I am of opinion that the principle of equity must prevail, that persons are not at liberty to depreciate the thing which they have sold. * * * I will specify what appears to me to be the rule in the present case, so far as it can be laid down. In the first place the new firm, the defendant in this case, is entitled to publish any advertisement he pleases in the papers, stating that he is carrying on such business. He is entitled to publish any circulars to all the world to say that he is carrying on such a business; but he is not entitled, either by private letter or by a visit, or by his traveller or agent, to go to any person who was a customer of the old firm and solicit him not to continue his business with the old firm, but to transfer it to him, the new firm. That is not a fair and reasonable thing to do after he has sold the good will. Customers, it is true, may be affected by public advertisements and public circulars, but that does not in the slightest degree militate against the principle I have laid down."

[2] Ginesi *v.* Cooper & Co., L. R. (1880), 14 Ch. Div., 596; Leggott *v.* Barrett, L. R. (1880), 15 Ch. Div., 306; Mogford v. Courtenay, 45 Law Times Reps., 303 (1881).

[3] Pearson *v.* Pearson, L. R. (1884), 27 Ch. Div., 145.

[4] Trego *v.* Hunt, L. R. (1896), A. C., 7, 20. Per Lord Herschell: "I quite feel the force of this argument, but it does not strike me as conclusive. It is often impossible to draw the line and yet possible to be perfectly certain that particular acts are on one side of it or the other. It does not seem to me to follow that because a man may, by his acts, invite all men to deal with him, and so, amongst the rest of mankind, invite the former customers of the firm, he may use the knowledge which he has acquired of what persons were customers of the old firm, in order, by an appeal to them to seek to weaken their habit of dealing where they have dealt before, or whatever else binds them to the old business, and so to secure their custom for himself. This seems to me to be a direct and intentional dealing with the good will and an endeavor to destroy it. If a person who has previously been a partner in the firm sets up in business on his own account and appeals generally for custom, he only does that which any member of the public may do, and which those carrying on the same trade are already doing. It is true that those who were former customers of the firm to which he belonged may of their own accord transfer their custom to him; but this incidental advantage is unavoidable, and does not result from any act of his. He only conducts his business in precisely the same way as he would if he had never been a member of the firm to which he previously belonged. But when he specifically and directly appeals to those who were customers of the previous firm he seeks to take advantage of the connection previously formed by his old firm, and of the knowledge of that connection which he has previously acquired, to take that which constitutes the good will away from the persons to whom it has been sold and restore it to himself."

[5] Jennings *v.* Jennings, L. R. (1898), 1 Ch. Div., 378; Gillingham *v.* Beddow, 69 L. J. Ch., 527 (1900); Curl Bros. *v.* Webster, L. R. (1904), 1 Ch. Div., 685. See also MacFarlane *v.* Dumbarton Steamboat Co. Ltd., 36 Scottish Law Rep., 771 (1899), where the Court of Session held that the vendor of a business should be enjoined from applying by letter, circular, or other written communication, or personally, or by traveler, agent, or servant, to any former customer, asking such person to deal with the defendant, or not to deal with the complainant.

Section 16. Passing off the goods of one manufacturer or dealer as those of another.

This practice is commonly termed "unfair competition" in this country, while the equivalent term used by the English courts is "passing off." The subject has been so thoroughly treated in text-books and reference books that only a brief resumé of the leading cases and established principles will be undertaken here.

Although the term "unfair competition" has been gradually extended so as to include other unfair methods used to secure the trade of a rival, as generally used by the courts, it applies especially to cases where one attempts to palm off his merchandise or business as that of another. In many of the digests, cases of this character are classified under the general head of trade-marks, although the law governing trade-marks in this respect is really a branch of the broader doctrine of unfair competition. The principal distinction is that in so-called unfair competition cases no exclusive proprietary interest in the names or marks used is necessary to relief, while in registered trade-mark cases an exclusive right is necessary.

AMERICAN DECISIONS.

Trade-marks are not defined in the act of February 20, 1905,[1] authorizing the registration of trade-marks, but section 2 of this act provides that a verified declaration stating that the applicant has an exclusive right to the particular mark sought to be registered, must accompany each application. That to entitle a name to equitable protection as a trade-mark the right to its use must be exclusive is clearly shown in the case of Canal Co. against Clark[2] where the complainant sought to have the name "Lackawanna," as applied to coal, protected as a trade-mark and was refused on the ground that others might use the name with as much truth as the complainant. And in Lawrence Manufacturing Co. against Tennessee Manufacturing Co.[3] the Supreme Court of the United States refused to protect the mark "L L" used by the complainant on sheetings as a trade-mark, holding that an exclusive right to the use of words, letters, or symbols to indicate merely the quality of the goods could not be acquired.

In order to obtain protection on the ground of unfair competition, however, both the Federal and State courts have held that an exclusive right to the name, mark, etc., is not absolutely necessary. For example, the circuit court of the United States granted an injunction restraining the manager of a company from using the name "Clark" or, "Clark's," in connection with the manufacture of thread, although William Clark was the principal incorporator of the company.[4]

[1] 33 U. S. Stat. L., p. 724, and amendments thereto.
[2] 13 Wall., 311 (1871).
[3] 138 U. S., 537 (1891).
[4] Clark Thread Co. v. Armitage, 67 Fed., 896 (1895).

And certain wholesale and retail grocers in Chicago were enjoined from using the word "Minnesota" in connection with the manufacture of flour.[1] There the court observed that it was hardly necessary to cite authority for the doctrine that in cases where the question is simply one of unfair competition in trade it is not essential that there should be an exclusive or proprietary right in the word or labels used, in order to maintain the action.

Another distinction is that in order to establish one's right to a trade-mark actual use with the intent to adopt the same is the test, rather than the length of time used. In the class of cases under discussion it is necessary to prove that the mark or name has acquired a secondary meaning, which generally requires a showing of long-continued use. In a recent case[2] the Supreme Court of Iowa held that before the courts will afford protection to the use of a name, symbol, or device it must be shown that as to the party complaining it has a secondary meaning in the public mind, which only comes from use, and, that it is understood to represent the goods of the party complaining, so that one using it, after such meaning had attached, would be in a position to practice fraud upon the complainant and the public.

Another distinction frequently drawn by the courts is that, while fraudulent intent need not be proved in trade-mark cases, it must be proved directly or by inference in all cases of "unfair competition" which do not involve a registered trade-mark. However, the courts are not unanimous in holding that it is necessary that fraudulent intent be proved in order to obtain an injunction against unfair competition. The Federal courts apparently adhere to the rule that fraudulent intent is necessary. In 1891, although denying the complainant relief, the Supreme Court held that unfair and fraudulent competition, if conducted with intent on the part of the defendant to avail itself of the reputation of the plaintiff to palm off its goods as plaintiff's, would, in a proper case, constitute ground for relief.[3] And in the Elgin Watch Co. case, decided in 1901, the same conclusion was reached.[4] This rule has been adopted and applied by the

[1] Pillsbury-Washburn Flour Mills *v.* Eagle, 86 Fed., 608 (C. C. A., 1898).

[2] Motor Accessories Manufacturing Co. *v.* Marshalltown Motor Material Manufacturing Co., 149 N. W., 184 (1914).

[3] Lawrence Manufacturing Co. *v.* Tennessee Manufacturing Co., 138 U. S., 537 (1891).

[4] Elgin National Watch Co. *v.* Illinois Watch Case Co., 179 U. S., 665, 674 (1901). The court by Chief Justice Fuller said: "If a plaintiff has the absolute right to the use of a particular word or words as a trade-mark, then if an infringement is shown, the wrongful or fraudulent intent is presumed, and although allowed to be rebutted in exemption of damages, the further violation of the right of property will nevertheless be restrained. But where an alleged trade-mark is not in itself a good trade-mark, yet the use of the word has come to denote the particular manufacturer or vendor, relief against unfair competition or perfidious dealing will be awarded by requiring the use of the word by another to be confined to its primary sense by such limitations as will prevent misapprehension on the question of origin. In the latter class of cases such circumstances must be made out as will show wrongful intent in fact or justify that inference from the inevitable consequences of the act complained of."

lower Federal courts with substantial unanimity. Thus, for example, where the defendant sold "Hires Root Beer," which had been manufactured by another from a liquid extract known as "Hires Improved Root Beer," relief was refused on the ground that the defendant did not know that the manufacturers of the extract had any objection to his advertising and selling the same.[1]

A contrary view, however, prevails in a number of the State courts. The New Jersey court of chancery in 1892 enjoined a defendant from using labels similar to those used by the complainant, although it appeared that in designing his labels he had no purpose or design of palming off his goods for those of the complainant.[2] And the Supreme Court of Massachusetts in a recent case enjoined the defendant from selling toothpicks in a box or package in imitation of the complainant's, although it appeared that he had acted innocently.[3]

The basis of relief in all these cases is fraud. In some cases equity prevents such fraud on the ground that the confusion of goods results in injury to the plaintiff's business, and in others on the ground that the public should be protected against such deception. A case based on the ground first mentioned is McLean *v.* Fleming, decided in 1887.[4] In this case a decree of the lower court restraining the defendant from using a similar trade name was affirmed, the court observing that a party has a valuable interest in the good will of his trade and in the labels and trade-marks which he adopts to enlarge and perpetuate it. An example of where relief was granted partially on the ground that the public should be protected is Reynolds Tobacco Co. *v.* Allen Bros. Tobacco Co., decided in 1907.[5] The court, in restraining the defendant from using a tag on plug tobacco similar to that of the complainant, said: "The public as well as individuals is entitled to protection from those who by unfair means and methods seek to palm off an article which is not what it is represented to be."

While it is not necessary to show that the defendant's goods have resulted in actual deception, it must be shown that the natural and

[1] Hires Co. v. Villepigue, 196 Fed., 890 (C. C. A., 1912). See also Faber *v.* Faber, 124 Fed., 603 (C. C., 1903); Fairbanks Co. *v.* Windsor, 124 Fed., 200 (C. C. A., 1903); Lamont, Corliss & Co. *v.* Hershey, 140 Fed., 763 (C. C., 1905); Samson Cordage Works *v.* Puritan Cordage Mills, 211 Fed., 603 (C. C. A., 1914); but see Bissell Chilled Plow Works *v.* T. M. Bissell Plow Co., 121 Fed., 357 (C. C., 1902).

[2] Wirtz *v.* Eagle Bottling Co., 50 N. J. Eq., 164 (1892).

[3] Forster Manufacturing Co. *v.* Cutter Tower Co., 97 N. E., 749 (1912). To the same effect are Holmes, Booth & Haydens *v.* Holmes, Booth & Atwood Manufacturing Co., 37 Conn., 278 (1870); Pratt's Appeal, 117 Pa. St., 401 (1888); Kansas Milling Co. *v.* Kansas Flour Mills Co., 133 Pac., 542 (Kans., 1913); Hartzler *v.* Goshen Churn & Ladder Co., 104 N. E., 34 (Ind. App., 1914).

[4] 96 U. S., 245.

[5] 151 Fed., 819 (C. C., 1907).

probable result is to deceive. In a recent case[1] a manufacturer of door checks was enjoined from using the word "Blount" in a certain manner, although the evidence was conflicting as to whether the public was deceived. The court held that proof of actual deception was not necessary, and that the court may determine without it, from the exhibits themselves, whether deception would be the natural and probable result. And an injunction has been granted where the goods which the defendant had made in imitation of the complainant's were simply offered for sale, but none sold.[2]

It is interesting to note in this connection that if the ultimate purchaser will probably be deceived as to the identity of an article, it is no defense that the retailer or immediate purchaser is not deceived by the manufacturer. Relief will be granted against the latter if it is shown that his purpose in selling to retailers was to defraud the public. Thus in the case of Royal Baking Powder Co. *v.* Royal[3] the defendant was enjoined from displaying his name on the front label of his cans in such a way that the retailer could easily pass off his goods for those of the complainant. And in a more recent case[4] an injunction was granted where it appeared that, although the defendant manufacturer made no attempt to deceive the retailers of the product, it did intend that the latter should substitute "Gay-Ola" for "Coca-Cola" in selling to consumers. Owing to the similarity of the product, it was claimed that the consumers would not know the difference. This principle has been announced in many other cases.[5]

On the other hand, a retailer or jobber may be enjoined from substituting the goods of one manufacturer for those of a competing manufacturer, and it is immaterial whether the substitution is made at the instigation of the competitor or upon the initiative of the retailer. Thus in a case decided by the circuit court in 1903[6] an injunction was issued restraining the defendant retailer from selling or delivering as Gold Dust that which was not Gold Dust. It appeared in this case that the defendant advertised Gold Dust for sale at a reduced price, and on several occasions handed out and delivered to his customers who called for this article another and inferior

[1] Yale & Towne Manufacturing Co. *v.* Worcester Manufacturing Co., 205 Fed., 952 (D. C., 1913).

[2] Enterprise Manufacturing Co. *v.* Landers, Frary & Clark, 131 Fed., 240 (C. C. A., 1904).

[3] 122 Fed., 337 (C. C. A., 1903).

[4] Coca Cola Co. *v.* Gay-Ola Co., 200 Fed., 720 (C. C. A., 1912).

[5] N. K. Fairbank Co. *v.* R. W. Bell Manufacturing Co., 77 Fed., 869 (C. C. A., 1896); Hostetter Co. *v.* Sommers, 84 Fed., 333 (C. C., 1897); N. E. Awl Co. *v.* Marborough Awl Co., 168 Mass., 154 (1897); Wolf Bros. & Co. *v.* Hamilton-Brown Shoe Co., 206 Fed., 611 (C. C. A., 1913), appeal pending in U. S. Supreme Court; Samson Cordage Works *v.* Puritan Cordage Mills, 211 Fed., 603 (C. C. A., 1914).

[6] N. K. Fairbank Co. *v.* Dunn, 126 Fed., 227 (C. C., 1903).

article known as "Buffalo." And in another case[1] it was shown that customers asking for "Baker's Cocoa" or "Baker's Chocolate" were given William Henry Baker's goods instead of the product manufactured by the complainant, the Walter Baker & Co. (Ltd.), an older establishment. The defendant's salesmen, after suit was brought, were also instructed, when such goods were called for, to say: "We have two Bakers. Which do you want, W. H. or Walter Baker?" Nine out of ten would ask for the best, and thereupon would be given W. H. Baker's goods. An injunction was issued restraining the defendant from advertising any product other than complainant's under the name of "Baker," or furnishing it in response to requests for "Baker's" goods, or in any manner using such name in connection with other goods without clearly designating by whom such goods were made.[2]

Just what similarity in name, label, or other method used amounts to unfair competition can best be shown by illustrative cases.[3] The cases reviewed have been classified as follows: (1) Geographic or place names; (2) company and trade names; (3) personal names; (4) descriptive and generic terms; (5) dress of goods; (6) dress of store; (7) imitation of goods themselves. Many of the cases on this subject fall into more than one of the above-mentioned classes. For example, the confusion of goods may have resulted from the similarity of the name used in conjunction with labels not unlike those used by the plaintiff. Relief will be granted even though some of the imitations, if practiced singly, might not constitute unfair competition.[4]

GEOGRAPHIC OR PLACE NAMES.—Geographic names or names of places, as a rule, can be adopted by any one in connection with his business. This rule, however, is subject to the qualification that when such names have become so associated with the articles to

[1] Baker *v.* Slack, 130 Fed., 514 (C. C. A., 1904).

[2] For other cases in which retailers or jobbers have been enjoined from substituting other goods for those of a certain manufacturer, see American Fibre Chamois Co. *v.* De Lee, 67 Fed., 329 (C. C., 1895); Lever Bros. Boston Works *v.* Smith, 112 Fed., 998 (C. C., 1902); Gaines *v.* Whyte Wine Co., 81 S. W., 648 (Mo., 1904); Barnes *v.* Pierce, 164 Fed., 213 (C. C., 1908); and Mellwood Distilling Co. *v.* Harper, 167 Fed., 389 (C. C., 1909). But in Walter Baker & Co. *v.* Gray, 192 Fed., 921, the Circuit Court of Appeals for the Eighth Circuit in 1911 apparently makes the qualification that the substitution must be of goods so similar in dress, form, and pattern that the ordinary purchaser, by the exercise of reasonable care will be unable to distinguish between them. In this case it was contended that the defendants, who kept the products of the plaintiff and of William H. Baker, of Syracuse, N. Y., for sale in their grocery store were guilty of unfair competition in handing out the latter company's product when "Baker's Chocolate," was called for by customers. The court held that inasmuch as the labels of the two products were so dissimilar in appearance that one could not be mistaken for the other by a purchaser of ordinary prudence, the defendant's acts in pushing the product upon which he made the most profit were not unlawful. The Supreme Court of the United States subsequently denied a petition for a writ of certiorari (223 U. S., 732 (1912)).

[3] Decisions affecting registered trade-marks are not discussed in this section.

[4] Sterling Remedy Co. *v.* Spermine Medical Co., 112 Fed., 1000 (C. C. A., 1901).

which they are attached that their use by a competitor in connection with his articles would confuse the public the courts will protect the first user. Such was the ruling of the court in a case where the word "Waltham" used in connection with the manufacture of watches was protected.[1] The complainant had for nearly 50 years manufactured watches at Waltham, Mass. The defendant who was the sole selling agent of the Columbia Watch Co., had, by the use of the name "Waltham" and a system of numbering, misled the public into buying its watches under the impression that they were buying the watches manufactured by the older firm. An injunction and an accounting were granted, the court holding that such conduct is in violation of the law against unfair trade because intended to deceive and defraud the public and to deprive the complainant of the trade and good will to which it is entitled. And "Angostura" the name of a town in Venezuela, was protected in connection with the sale of bitters, although the name of the town had since been changed and the complainants no longer manufactured their product at that place.[2] Similarly an injunction was granted restraining the defendant from using the name "Boston" in connection with the sale of wafers, an article of confectionery.[3]

The question often arises in the adoption of a company name, a part of which may be the location of the company. Thus the use of the name "Lock City Canning Co." was enjoined at the complaint of the "Lockport Canning Co.," both parties being engaged in canning tomatoes at Lockport, N. Y.[4] It appears that Lockport is commonly known as the Lock City, and the court held that this, together with the fact that they were engaged in the same business, was calculated to deceive customers. And in a recent case the circuit court of appeals, at the instance of the British-American Tobacco Co., restrained the British-American Cigar Stores Co. from using the words "British-American" in its corporate name.[5]

COMPANY AND TRADE NAMES.—Where the name of a company has acquired a secondary meaning the courts will enjoin its use by another company if confusion would otherwise result. In one of the earliest cases decided upon the ground of unfair competition the defendant was enjoined from using the name "Irving Hotel," the plaintiff's hotel, although originally designated as the "Irving House," being very generally known as the "Irving Hotel."[6] Similarly the Supreme Court of Iowa enjoined the Atlas Insurance Co.

[1] American Waltham Watch Co. *v.* Sandman, 96 Fed., 330 (C. C., 1899).
[2] Siegert *v.* Gandolfi et al., 140 Fed., 100 (C. C. A., 1907).
[3] C. A. Briggs Co. *v.* National Wafer Co., 215 Mass., 100 (1913).
[4] Lockport Canning Co. *v.* Pusateri, 139 N. Y. Supp., 640 (Sup. Ct., 1913), aff'd; 145 N. Y. Supp., 130 (App. Div., 1914).
[5] 211 Fed., 933 (C. C. A., 1914).
[6] Howard *v.* Henriques et al., 5 N. Y. Super. Ct. Reps., 725 (1851).

from using the word "Atlas" in its name in a misleading way, there being at that time an insurance company known as the Atlas Assurance Co. (Ltd.).[1] The same rule applies to corporate names, and there are many cases in which the use of confusing names has been enjoined. In 1887 the circuit court issued an injunction restraining the defendant from using the name "Cellonite Manufacturing Co.," due to its similarity to the name of the complainant, the Celluloid Manufacturing Co.[2] In another case the complainant since 1891 had manufactured and advertised a numbering machine known as "the Bates numbering machine." In 1895 Bates, the patentee, severed his connection with the complainant and later organized the Bates Machine Co. In 1909 the defendant changed its name to the Bates Numbering Machine Co. and referred to its machines in its advertisements as Bates numbering machines. The court affirmed an order of the circuit court which restrained the defendant from using the words "Bates Numbering Machine Co." as its corporate name, or any other words resembling the trade name of the complainant which would mislead the public.[3] In another case[4] the complainant corporation, which was the first user of the name "Hall" in connection with the manufacture of safes, was granted an injunction restraining the defendant, a corporation engaged in the same line of business, from using the name "Hall" either alone or any combination as a corporate name, unless it was accompanied by a statement clearly indicating that the defendant was a separate and independent concern from the complainant. And in a recent case the Court of Civil Appeals of Texas held that the adoption of the name "Howe Grain Co." by a former manager of the "Howe Grain & Mercantile Co." upon engaging in a similar business at the same place, under the circumstances, was a fraud and deception upon the complainant and the public.[5]

The adoption of names likely to be confused with existing corporations is regulated to some extent by statute,[6] but the fact that the State issues a charter to a corporation by a certain name does not give such corporation a right to use it for the purpose of deceiving the public. Of course, the right to a particular name will only be protected within the locality where the name is known. As was said by the Supreme Court of Washington, "There can not be unfair trade competition unless there is competition."[7] In this case the

[1] Atlas Assurance Co. (Ltd.) *v.* Atlas Insurance Co., 138 Iowa, 228 (1907).

[2] Celluloid Manufacturing Co. *v.* Cellonite Manufacturing Co., 32 Fed., 94 (C. C., 1887).

[3] Bates Numbering Machine Co. *v.* Bates Manufacturing Co., 178 Fed., 681 (C. C. A., 1910).

[4] Herring-Hall-Marvin Safe Co. *v.* Hall's Safe Co., 208 U. S., 554 (1908).

[5] Hughes *v.* Howe Grain & Mercantile Co., 162 S. W., 1187 (1914). See also Crutcher & Starks et al. *v.* Starks et al., 161 Ky., 690 (1914); Busby *v.* Keystone Oil & Manufacturing Co., 206 Fed., 136 (D. C., 1913).

[6] See p. 505.

[7] Eastern Outfitting Co. *v.* Manheim et al., 110 Pac., 23 (1910).

plaintiff, under the name of the "Eastern Outfitting Co., of Seattle, Wash.," was engaged in the business of selling clothing in the city of Seattle and vicinity. It did no business in the eastern part of the State with the exception of one transaction with a customer who had moved from Seattle to Spokane. The defendant was engaged in the retail mercantile business in the city of Spokane under the name of "Eastern Outfitting Co." Subsequently the plaintiff undertook to engage in business in Spokane, claiming to have an exclusive right to the above name by reason of being the first user thereof. The court held, however, that the protection a party is entitled to in his trade name is only coextensive with his market, and instead of granting the relief prayed for by the plaintiff, enjoined the latter from using the name "Eastern Outfitting Co." in the city of Spokane. In like manner, it has been held that there can be no confusion of identity between two tailoring establishments of the same name located in the cities of New York and Chicago,[1] although the contrary is true where such establishments conduct a mail-order business.[2]

PERSONAL NAMES.—As a general rule, equity will not prevent a person from using his own name, but when the name of a person has become closely associated with his goods or business the courts often regulate its use by a competitor of the same name who afterwards engages in business. One of the "Baker" cases illustrates the relief granted in such instances.[3] There the defendant was restrained from using the words "& Co." and from using the word "Baker" alone, and was required to use the name in some distinctive manner when applied to the manufacture of chocolate. The business of the complainant had been established about the year 1780, while that of the defendant was of recent origin. This is only one of the many cases in which Walter Baker & Co. (Ltd.) have been complainants. In 1897 a defendant was required to place upon his packages in prominent type the words "W. H. Baker is distinct from and has no connection with the old chocolate manufactory of Walter Baker & Co."[4] And in a suit by the same firm against William P. Baker the court required that the defendant should use his name in full, "William P. Baker" or "William Phillips Baker."[5] And in 1904 the defendant was restrained from advertising the goods of William H. Baker, of Winchester, Va., as "Baker's" goods.[6]

A similar line of cases illustrating the care which a man must exercise in using his own name when entering a particular business in

[1] Arnheim *v.* Arnheim, 59 N. Y. Supp., 948 (1899).
[2] Ball *v.* Best, 135 Fed., 434 (1905); and see Grant *v.* Levitt, 18 R. P. C., 361 (1901).
[3] Walter Baker & Co. (Ltd.) *v.* Baker, 77 Fed., 181 (C. C., 1896).
[4] Walter Baker & Co. (Ltd.) *v.* Sanders, 80 Fed., 889 (C. C., 1897).
[5] Walter Baker & Co. (Ltd.) *v.* Baker, 87 Fed., 209 (C. C., 1898).
[6] Baker & Co. *v.* Slack, 130 Fed., 514 (C. C. A., 1904).

which some one by the same name has already an established trade is found in the Rogers cases. The original Rogers firm manufacturing silverware was the William Rogers Manufacturing Co., which was later transferred to the International Silver Co. In an early case the defendant, the Rogers Manufacturing Co., was enjoined from using the name "Rogers" on its ware.[1] And in a later case two sons of the original Rogers brothers were enjoined from using the words "Rogers" or "Rogers Bros." and from stating that their goods were "the real Rogers goods."[2] And where a corporation used the name "William H. Rogers Corporation" fraudulently, the use of the name "Rogers" in any form was enjoined.[3] Subsequently Rogers started in business on his own account, and the court refused to enjoin him from using his own name, but required him to use the words "not the original Rogers" or "not connected with the original Rogers" in connection with his name.[4]

The Supreme Court of the United States apparently has held that the court will not interfere where the only confusion, if any, results from the similarity of the names and not from the manner of the use.[5]

Subsequently, however, this rule appears to have been somewhat qualified, as is shown by the decision in the Waterman case.[6] This was a suit to enjoin the defendant from using in connection with the manufacture and sale of fountain pens the name "A. A. Waterman" or any name containing the word "Waterman" in any form. The lower court restrained the defendant from using the name A. A. Waterman & Co., and required that the words "not connected with the L. E. Waterman Co." be placed side by side, in equally large and conspicuous letters, with the permitted name of Arthur A. Waterman & Co. Both parties appealed, the defendant on the ground that the only confusion shown to exist resulted from a similarity of names and not from the manner of the use.[7] The

[1] William Rogers Manufacturing Co. *v.* Rogers Manufacturing Co., 16 Phila., 178 (1883).

[2] International Silver Co. *v.* Simeon L. & George H. Rogers Co. et al., 110 Fed., 955 (C. C., 1901).

[3] International Silver Co. *v.* William H. Rogers Corporation, 60 Atlantic, 187 (N. J. Ct. of Err. and App., 1905).

[4] International Silver Co. *v.* William H. Rogers, 67 Atl., 105 (N. J. Ct. of Err. and App., 1907). See also Kaufman *v.* Kaufman, 123 N. Y. Supp., 699 (Sup. Ct., 1910); Guth Chocolate Co. *v.* Guth, 215 Fed., 750 (1914); and Chickering et al. *v.* Chickering & Sons et al., 215 Fed., 490 (C. C. A., 1914).

[5] Howe Scale Co. *v.* Wyckoff, Seamans & Benedict, 198 U. S., 118 (1905).

[6] L. E. Waterman Co. *v.* Modern Pen Co., 235 U. S., 88 (1914).

[7] As to this contention, Mr. Justice Holmes in delivering the opinion of the court said (p. 94): "But whatever generality of expression there may have been in the earlier cases, it now is established that when the use of his own name upon his goods by a later competitor will and does lead the public to understand that those goods are the product of a concern already established and well known under that name, and when the profit of the confusion is known to and, if that be material, is intended by the later man, the law will require him to take reasonable precautions to prevent the mistake."

plaintiff's appeal was based on the ground that the agreement of A. A. Waterman with the defendant was a mere sham to allow the latter to use the name on its pens. The decree of the Circuit Court of Appeals was affirmed, holding that the injunction granted was sufficient to protect the plaintiff's rights. Mr. Justice Pitney, however, dissented, being of the opinion that the defendant should be unqualifiedly enjoined from using the name Waterman on the ground that the agreement just referred to was a mere sham.

But where it clearly appeared that a personal name was adopted by a firm or corporation for the express purpose of securing the good will of a rival, other courts have granted the full measure of relief. Thus in a case where the defendant assumed the name of a stockholder with the evident purpose of appropriating the trade of a well-known snuff concern of the same name, the use of the name in the defendant's business was enjoined.[1]

DESCRIPTIVE AND GENERIC TERMS.—The use of these terms is governed by the same general rules which apply to names. Protection will be afforded, even though the right to the term is not exclusive, if it has taken on a secondary meaning. For example, the word "Rubber-vulc" was held to be so similar to the word "Rubber-set" that its use should be restrained as unfair competition.[2] The defendant was also restrained from using the word "Rubber-Bound" in its corporate name, on the ground that the name, being displayed on the goods, it would mislead the public as to whose goods they were purchasing. And the use of the words "No-hole" in connection with the advertisement and sale of socks has been enjoined at the instance of another manufacturer of such goods who had already made use of the word "Holeproof."[3]

As a rule descriptive words can not be appropriated as technical trade-marks. The name "Turpentine Shellac," as applied to a preparation used as a priming coat upon inside wood finish, had been registered and recorded in the Patent Office by the complainant. Later the manufacturer of a similar preparation adopted the same name. The court held that while the term could not be adopted for

[1] Garrett et al. *v.* T. H. Garrett & Co., 78 Fed., 472 (C. C. A., 1896). See also International Silver Co. *v.* William H. Rogers Corporation, 60 Atl., 187 (N. J. Ct. of Err. and App., 1905).

[2] Rubber & Celluloid Harness Trimming Co. *v.* Rubber-Bound Brush Co. et al., 88 Atl., 210 (N. J. Ct. of Err. and App., 1913).

[3] Holeproof Hosiery Co. *v.* Fitts et al., 167 Fed., 378 (C. C., 1908). See also Florence Manufacturing Co. *v.* J. C. Dowd & Co., 178 Fed., 73 (C. C. A., 1910), in which it was held that the use of the word "Sta-Kleen" should be enjoined at suit of the proprietor of the word "Keepclean." And see Hartzler et al. *v.* Goshen Churn & Ladder Co., 104 N. E., 34 (Ind. App., 1914). The court in Rubber & Celluloid Harness Trimming Co. *v.* Rubber-Bound Brush Co., supra, said: "while the use of descriptive words cannot be defended upon the ground that they constitute a trade-mark, yet * * * where a descriptive word has been before the public so long and to such an extent as that it would be unjust for any one to simulate it, and thus enable his goods to pass off as the goods of another, equity, which looks at the substance and not the mere form of things, will prevent the use of such words and give the complainant relief by way of injunction."

exclusive use as a trade-mark the complainant was entitled to protection from an unfair use of the name that might result in his injury and in fraud of the public.[1]

In order to acquire an attractive name for their goods, manufacturers often coin new words which sometimes, from continued use, become as well known as the article itself. Competitors do not as a rule adopt the same word or phrase used by their successful opponents, but adopt a word similar in sound to one already in use. In a recent case[2] unfair competition was alleged on many grounds, among which was the similarity between the names "Uneeda" and "Abetta." The defendant's trade was limited to the Pacific coast, while that of the complainant was nation wide. As to the name "Abetta," the defendant was restrained from putting up and selling or offering for sale any carton of bakery products having thereon an imitation of complainant's "Uneeda Biscuit" trade name calculated to mislead or deceive, like that on defendant's carton, "Abetta Biscuit." It has been said that a trade name, unlike a trade-mark, appeals to the ear more than to the eye.[3] In that case the complainant had used the name "Gold Dust" in connection with the sale of washing powder for some years, and the defendant subsequently beginning the manufacture of a washing powder adopted the name "Gold Drop." Although care was taken to use a different style of labels and packages, the court held that the name was so similar in sound as to mislead or deceive customers. As a rule, however, the use of similar descriptive or generic terms is not of itself sufficient ground for injunctive relief where it appears that the article to which the names are attached is so differently dressed and labeled that deception is not likely to result. Thus in a case[4] decided by the United States Supreme Court the use of the word "Rubbero" was held not unfair in competition with the manufacturers of an article known as "Ruberoid." Both the complainant and defendant were manufacturers of roofing material, but it appeared that there was no imitation by the defendant in the arrangement, color, design, or general appearance of the wrappings or markings on the package. Similarly the use of the name "Baco-Curo" has been decided not to be unfair in competition with "No-To-Bac,"[5] nor "Koke" in competition with "Coca-Cola,"[6] nor "New Idea" in competition with "New Departure."[7] It should be borne in mind,

[1] Standard Varnish Works *v.* Fisher, Thorsen & Co., 153 Fed., 928 (C. C., 1907).
[2] National Biscuit Co. *v.* Pacific Coast Biscuit Co. et al., 91 Atl., 126 (N. J. Ct. of Chancery, 1914).
[3] N. K. Fairbank Co. *v.* Luckel, King & Cake Soap Co., 102 Fed., 327 (C. C. A., 1900).
[4] Standard Paint Co. *v.* Trinidad Asphalt Manufacturing Co., 220 U. S., 446 (1911).
[5] Sterling Remedy Co. *v.* Eureka Chemical & Manufacturing Co., 70 Fed., 704 (C. C., 1895).
[6] Coca-Cola Co. *v.* Branham et al., 216 Fed., 264 (D. C., 1914).
[7] Hamilton Manufacturing Co. *v.* Tubbs Manufacturing Co., 216 Fed., 401 (C. C., 1908).

therefore, that the similarity in name is usually only one of the controlling elements in such cases.

DRESS OF GOODS.—Imitation of the labels or packages of a rival is one of the most common forms of technical unfair competition. The use of labels is to a large extent protected under the law of trade-marks, but many are of such a nature that they can not be exclusively appropriated. As previously stated,[1] in unfair competition cases it is not necessary that the plaintiff's right be exclusive in order to be protected. If the defendant's label, in the opinion of the court, is liable to result in confusion, relief will be granted. A case in which only the similarity of labels was involved is that of Notaseme Hosiery Co. *v.* Straus et al.[2] The engraving company which prepared the complainant's label also designed that of the defendant, each being a rectangular design having a diagonal black band with white script and triangular red panels. It was also shown that the plaintiff had used the label six months prior to its adoption by the defendant. The defendant was notified of the similarity of the label, but continued its use. An injunction was granted and the complainant was awarded the profits made on sales of hosiery by the defendants from the time they were notified of the similarity of the labels used.

Mere use of the same color apart from any other feature probably would not be enjoined as unfair, although color may be one of the elements contributing to a general similarity which is deceptive. It is the effect of the whole which is the controlling element in such cases. For example, a competitor of the Reynolds Tobacco Co. adopted tin tags for a certain brand of its plug tobacco, similar in size, shape, and color to those used by the complainant on its "Schnapps" brand of tobacco. The use of the tag was enjoined, although the defendant used the word "Traveller" instead of the word "Schnapps."[3] And in Franck et al. *v.* Frank Chicory Co. et al.,[4] where the complainant had sold chicory in packages of cylindrical form inclosed in red paper for 25 years, it was held to be unfair competition for a competitor to use a label of the same color and general design. There are numerous cases decided on this ground.[5]

[1] See p. 431.

[2] 201 Fed., 99 (C. C. A., 1912); 209 Fed., 495 (D. C., 1913).

[3] Reynolds Tobacco Co. *v.* Allen Bros. Tobacco Co., 151 Fed., 819 (C. C., 1907).

[4] 95 Fed., 818 (C. C., 1899).

[5] Seeman et al. *v.* Zechnowitz, 121 N. Y. Supp., 125 (App. Div., 1910); Wm. Wrigley, Jr., Co., *v.* L. P. Larson, Jr., Co. et al., 195 Fed., 568 (C. C., 1911); American Pin Co. *v.* Berg Bros., 188 Fed., 683 (C. C., 1911); Schwahn et al. *v.* Miele et al., 203 Fed., 176 (D. C., 1913); Lawrence et al. *v.* P. E. Sharpless Co., 208 Fed., 886 (C. C. A., 1913); Modesto Creamery *v.* Stanislaus Creamery Co. et al., 142 Pac., 845 (Cal. Sup. Ct., 1914); H. E. Winterton Gum Co. *v.* Autosales Gum & Chocolate Co., 211 Fed., 612 (C. C. A., 1914); Tanqueray, Gordon & Co. *v.* Gordon D. & D. Co., 213 Fed., 510 (D. C., 1914).

Similarly, the imitation of the form of a package or container alone seldom constitutes unfair competition. One of the few exceptions is where the use of a peculiarly shaped bottle was enjoined.[1] In this case, although both parties bottled whisky made by the Hannis Distilling Co., known as "Mount Vernon Pure Rye Whiskey," the complainant had the sole privilege of attaching the distiller's guaranty of purity. The complainant had adopted a peculiar, flat-shaped bottle, and the defendant afterwards began using a bottle of the same shape and appearance, but which he claimed to have purchased in open market. Although the labels were different, a preliminary injunction was issued on the ground that whether the whisky was the unadulterated Mount Vernon whisky depended on the reputation of the individual bottler, and therefore the consumer was or might be deceived.

It is also unfair competition to dispose of one's goods in bottles or packages bearing another's marks, labels, or names. This method, however, is not often employed. In a recent case[2] where the bill charged sales by defendant of an article resembling in color, appearance, and flavor the plaintiffs' brandy, the giving therewith of empty genuine Hennessey bottles, and the advising and assisting of purchasers to place defendant's liquors in plaintiffs' bottles and to sell the same as genuine Hennessey brandy, it was held that an injunction restraining such a practice should issue.

Dress of store.—The deceptive dress of a store or the use of a sign which will cause confusion as to the identity of the store will also be enjoined. Misleading names are usually the controlling feature of such cases. A case in which the similar dress of a store was involved was decided by the California Supreme Court in 1895.[3] The plaintiff was engaged in the clothing and dry goods business, its store being known as the "Mechanics' Store." The defendant upon engaging in business of the same general character, erected a building very much like that of the plaintiff in the same block, designating his store as the "Mechanical Store." The lower court restrained the defendant from the further use of the name and also decreed that the defendant maintain and place in a conspicuous part of his store and also in a conspicuous place on the outside or front thereof, a sign showing the proprietorship of said store in letters sufficiently large to be plainly discernable by customers. On appeal the latter part of the injunction was modified in that the defendant was only required to distinguish his place of business from that of the plaintiff in some mode or form which would sufficiently indicate to

[1] Cook & Bernheimer Co. *v.* Ross et al., 73 Fed., 203 (C. C., 1896).

[2] Hennessey et al. *v.* Wine Growers' Association, 212 Fed., 308 (D. C., 1914). See also Samuel Bros. & Co. *v.* Hostetter Co., 118 Fed., 257 (C. C. A., 1902).

[3] Weinstock, Lubin & Co. *v.* H. Marks, 42 Pac., 142.

the public that it was a different place of business. And in Nokes *v.* Mueller[1] the appellant was enjoined from using milk wagons decorated in a certain manner which was practically identical with the painting on those of the appellee, excepting that the name "Walnut Park Dairy" was used instead of "Walnut Grove Dairy."

The use of signs which would mislead customers as to the identity of the place of business has also been enjoined.[2] There the defendant moved his clothing store next door to that of the plaintiff which was known as "The Globe." Globes representing the earth, similar in appearance to those used by the plaintiff, were placed in the windows and other conspicuous places. He was enjoined among other things from using symbols, devices, paintings, or advertisements, or any combination of such elements as to give to his store the appearance of its being a part of, or used in connection with, the store of the plaintiff.[3]

In this connection it is interesting to note that while one has a right to state to the public that he has been in the employ or formerly connected with another firm he must not display the name of the latter more prominently than his own name so as to mislead the public. Thus a former employee of the Colton Dental Association who had opened a dental office of his own on the same street was enjoined from using a sign and cards on which was printed his own name with the addition, "Formerly operator at the Colton Dental Rooms," the words "Formerly operator at" being in much smaller letters than "Colton Dental Rooms."[4] Similarly, where a retiring partner embarked in the same line of business, only a short distance from the old store, and put up a sign bearing his own name and the words "of the late firm of" followed by the name of the older firm, it was held that an injunction should issue and that actual fraudulent intention need not be established in such cases.[5] And in New York it has been held unlawful for one to misrepresent to the public the capacity in which he was formerly employed. Thus a defendant who had acted simply as a business manager of a medicine company, another having charge of the medical department, was enjoined from advertising himself as "late manager" of such company.[6]

IMITATION OF GOODS THEMSELVES.—The general rule is that in the absence of patent protection the general get-up of an article may be copied. Under certain circumstances it may be unfair for one to make an exact copy of an article even when it is sold under his own

[1] 72 Ill. App., 431 (1897).

[2] Lippman *v.* Martin, 5 Ohio N. P. Rep., 120 (1898).

[3] See also Johnson *v.* Hitchcock, 3 N. Y. Supp., 680 (Sup. Ct., 1888), and Cady *v.* Schultz, 19 R. I., 193 (1895).

[4] Colton *v.* Thomas, 7 Phila., 257 (1869).

[5] Smith *v.* Cooper, 5 Abb. N. C, 274 (1877).

[6] Humphrey's Homeopathic Medicine Co. *v.* Bell et al., 2 N. Y. S. R., 78 (1888). See also Colton *v.* Deane, 7 N. Y. S. R., 78 (1887).

name. Copying the necessary features of an article will not be prohibited, but copying the nonfunctional parts of an article made by a rival has been enjoined. In a case decided in 1904,[1] the court said "defendants overlooked the fact that a court of equity will not allow a man to palm off his goods as those of another, whether his misrepresentations are made by word of mouth, or, more subtly, by simulating the collocation of details of appearance by which the consuming public has come to recognize the product of his competitor." The complainant had for 30 years manufactured a line of mills of various sizes for grinding coffee, drugs, etc., adopting therefor a certain characteristic shape, design, color, and ornamentation which had become well known to purchasers and associated in their minds with his goods. Later the defendants began the manufacture of a similar line of goods imitating all of the distinguishing features of the article but selling them under their own name. They were enjoined from selling the different styles of mills which had already been imitated and also from imitating in the future other styles which defendant had declared his intention to make.

And while many of the features of an article may separately be a subject of appropriation because they were not original with plaintiff, the appropriation of all of the prominent features in such a manner as would probably deceive the ordinary purchaser constitutes unfair competion. Such was the ruling in a case[2] where padlocks, manufactured by the defendant, represented the plaintiff's article in form, size, color, lettering, and in details of finish. The chief differences were that the complainants' lock bore the name "Yale," while the defendant used the name "Yap" on its product, and each had its respective name, with the place of manufacture, on its product. The court held that although dealers, and the trade generally, would no doubt notice the differences, ordinary purchasers would be deceived.

It has been held that the manufacture and sale of repair parts is not unlawful if there is no deception and the goods are not represented to be those of another. Thus where a manufacturer of farm machinery and the separate parts thereof, adopted a system of stamping upon the different parts a letter designating the style of the machine, followed by a numeral designating the particular part, so as to enable the users of the machines to readily obtain repairs, it was held not to be unfair competition for another manufacturer of such repair parts to use such markings and advertise by catalogue that their goods were adapted to the complainant's machines and inter-

[1] Enterprise Manufacturing Co. *v.* Landers, Frary & Clark, 131 Fed., 240 (C. C. A., 1904).

[2] Yale & Towne Manufacturing Co. *v.* Adler, 154 Fed., 37 (C. C. A., 1907).

changeable with the corresponding parts furnished by the original manufacturer of said machines, where the repair parts were not covered by patents and it was stated that the parts so offered were of their own manufacture.[1] And in a more recent case,[2] a Federal circuit court of appeals reversed a decree of the circuit court granting an injunction, although it was contended by the complainant that the fact that the repair parts made by the defendant reached the consumer without any markings to indicate their origin would mislead purchasers thereof into believing that they were made by the complainant, the well-known maker of the machines.

Owners of patented or copyrighted articles have an exclusive right to make and sell the article during the life of the patent or copyright. At the expiration of the patent or copyright the public is entitled to copy the article and use its name, but is not entitled to palm off such goods as the make of the original manufacturer and must distinguish them in such a manner as not to cause confusion. Such an attempt was held to be unfair in G. & C. Merriam Co. *v.* Ogilvie.[3] In that case the complainants' copyright on the name "Webster," used in connection with dictionaries, having expired, the defendant adopted the name, accompanied by other words and phrases used by the complainant, conveying the impression that his dictionary was a later edition of the complainants'. The defendant used the words "Imperial" and "Universal" instead of the word "International," used by the complainant. The complainant was denied the right of sending out circulars to the effect that it had the exclusive right to the name, while the defendant was enjoined from sending out circulars and advertisements trespassing on the reputation of the plaintiff or which would mislead purchasers into buying his dictionary for one of the series published by the complainant. The injunction as to the defendant was broadened on appeal so as to preclude the use of misleading words on the title pages and the backs of the dictionaries.

ENGLISH DECISIONS.

The legal term applied by the English courts to cases where one party does or attempts to palm off his goods or business as that of another is "passing off." In the American courts the equivalent term used is "unfair competition," although that term has gradually been broadened so as to include other unfair means used in competition. The important distinctions in the United States decisions

[1] Deering Harvester Co. *v.* Whitman & Barnes Mfg. Co., 91 Fed., 376 (C. C. A., 1898).
[2] Bender et al. *v.* Enterprise Mfg. Co., 156 Fed., 641 (C. C. A., 1907).
[3] 170 Fed., 167 (C. C. A., 1908). See also Singer Manufacturing Co. *v.* June Manufacturing Co., 163 U. S., 169 (1896); Yale & Towne Manufacturing Co. *v.* Worcester Manufacturing Co., 205 Fed., 952 (D. C., 1913); Jenkins Bros. *v.* Kelley & Jones Co., 212 Fed., 328 (D. C., 1914), appeal pending; Prest-O-Lite Co. *v.* Davis, 215 Fed., 349 (C. C. A., 1914).

between trade-mark actions and actions for unfair competition, as shown in a discussion of the cases under this heading, are (1) that no exclusive right is necessary in cases of unfair competition; (2) that to obtain relief on the ground of unfair competition it is necessary to show that the name or mark sought to be protected has acquired a secondary meaning; and (3) that many courts refuse relief on the ground of unfair competition unless fraudulent intent is shown or is clearly inferable from the circumstances. The first and second distinctions noted above are recognized by the English courts, but it is well settled that proof to the effect that the defendant intended to deceive is no more necessary in passing off actions than in cases of infringement of trade-marks, and as Lord Justice Lindley said in the case where the words "Camel-Hair Belting" were protected: "All that need be proved is that the defendants' goods are so marked, made up, or described by them as to be calculated to mislead ordinary purchasers and to lead them to mistake the defendants' goods for the goods of the plaintiffs."[1] In 1899 the House of Lords, although denying the plaintiff protection in the use of the word "cellular," as applied to cloth, held that in order to claim the interference of the court it was not necessary to show fraudulent intention.[2]

Also in actions for passing off, it is sufficient to prove that retailers may succeed in deceiving the public as to whose goods they are purchasing. In an early case,[3] it appeared from the evidence that the retailers, who bought the goods of the defendant, knew by whom they were manufactured, but resold them as and for goods manufactured by the plaintiff. The court in refusing a new trial held that, although the defendants did not themselves sell the articles as goods of the plaintiff's manufacture, it was substantially the same thing for them to sell to retail dealers for the express purpose of being resold as such. And the retailer, jobber, or other middleman might be enjoined from substituting another's goods for those of the plaintiff's manufacture. Thus, in a case decided by the Superior Court for the District of Montreal,[4] the defendants, the proprietors of a confectionery store in Montreal, were perpetually enjoined from selling or offering for sale under the name "Bovril" any substance, preparation, or extract of beef as being the product of plaintiff's manufacture other than that manufactured and sold by the plaintiff. It was alleged that they served customers who asked for "Bovril" with a preparation of fluid beef known as "Armour's

[1] Reddaway *v.* Banham Hemp-Spinning Co., L. R. (1892), 2 Q. B., 639.
[2] Cellular Clothing Co. (Ltd.) *v.* Maxton & Murray, L. R. (1899), A. C., 326.
[3] Sykes *v.* Sykes, 3 B. & C. Reports, 541 (1824).
[4] Bovril (Ltd.) *v.* Metrakos et al., 17 La Revue de Jurisprudence, 32 (1909).

Beef Cordial" and "Armour's Extract of Beef." Similarly, where wine merchants advertised wine furnished by Alexander D. Taylor as "Taylor's" wine, it was held that the plaintiff had a cause of action against the defendants for offering to sell to the trade as "Taylor's" wine that which was not the well-known wine manufactured by the plaintiff.[1]

Actions for infringement are frequently joined with actions for passing off. The passing off feature is of less importance since the passage of the trade-mark act of 1905,[2] which has had the effect of entitling many names and words to registration as valid trade-marks which were before merely trade names or common-law trade-marks. The important section in this connection provides in part as follows:

A registrable trade-mark must contain or consist of at least one of the following essential particulars:

(1) The name of a company, individual, or firm represented in a special or particular manner.

(2) The signature of the applicant for registration or some predecessor in his business.

(3) An invented word or invented words.

(4) A word or words having no direct reference to the character or quality of the goods and not being according to its ordinary signification a geographical name or a surname.

(5) Any other distinctive mark but a name, signature, or word or words other than such as fall within the description in the above paragraphs (1), (2), (3), and (4) shall not, except by order of the board of trade or the court, be deemed a distinctive mark.

* * * * * * *

For the purposes of this section "distinctive" shall mean adapted to distinguish the goods of the proprietor of the trade-mark from those of other persons.[3]

* * * * * * *

Under this section, for example, the word "Oswego" has been held entitled to registration as a trade-mark,[4] whereas prior to the passage of the act of 1905 such words could only have been protected by an action for passing off. Therefore any infringement of the use of such words can now be prevented by a statutory trade-mark action without resorting to the doctrine of passing off. Cases of this sort have been omitted from the present discussion, only those which were decided on the ground of passing off being included. The same classifications which were adopted in the review of the American cases have been followed.

GEOGRAPHIC OR PLACE NAMES.—Use of such names prior to the enactment of the trade-mark act was only protected when the words

[1] Yeatman *v.* Homberger & Co., 107 Law Times Reps., 742 (Ct. of App., 1912). See also Parazone Co. (Ltd.) *v.* Gibson, 21 R. P. C., 317 (1904), and Kinnell & Co. (Ltd.) *v.* A. Ballantine & Sons, 47 Scot. Law Reps., 227 (1909).

[2] 5 Edw., 7, chap. 15.

[3] Id., sec. 9.

[4] In re National Starch Co.'s Application, 25 R. P. C., 802 (1908).

had acquired a secondary meaning and their use by another would result in confusion. Thus in the well-known "Stone Ale" case[1] the defendant was enjoined from carrying on the business of a brewer at Stone under the title "Stone Brewery" or "Montgomery's Stone Brewery" or from selling any ale or beer not of the plaintiff's manufacture under the term "Stone Ales" or "Stone Ale." Lord Hannen, in answering the defendant's contention that the word was merely used in a geographical sense, said:

> * * * The appellant is, undoubtedly, entitled to brew ale at Stone, and to indicate that it was manufactured there, but there are various means of stating that fact without using the name which has now become the designation of the respondent's ale.

Frequently the relief granted in such cases is merely an injunction restraining the use of the word unless it is accompanied by a statement sufficient to distinguish the two products. Such was the holding of the court as to the use of the words "Yorkshire Relish."[2] In this case the respondent had for many years manufactured and sold a sauce made according to a secret recipe under the above name. The appellants were engaged in manufacturing and selling a different sauce but which they termed "Yorkshire Relish." The House of Lords held that the term had come to mean the particular product of the respondent.

Where the same geographical name is given to two natural as distinguished from manufactured products of a particular locality, it appears that the courts are less inclined to interfere. Thus, in Braham *v.* Beachim,[3] the plaintiff was the owner of and operated all the collieries in the parish of Radstock, carrying on the business under her own name, adding the words "Radstock Collieries." The defendants operated mines but none in this parish. They advertised themselves as "The Radstock Colliery Proprietors and Factors, etc.," offering to supply coal of every description direct from the collieries. An injunction was issued restraining the defendants from using the trade name unless they acquired a coal mine within the parish of Radstock or from using any name implying that they were selling coal from a colliery in Radstock unless and until they became authorized to sell coal mined within that parish. And in a later case,[4] it appeared that the plaintiffs were owners of certain mineral springs in the township of Caledonia and marketed the water for medicinal and table purposes under the name "Caledonia Water." The defendants having discovered other springs in the same township sold water therefrom as "From the New Springs of

[1] Thomas Montgomery *v.* Thompson et al., L. R. (1891), A. C., 217.
[2] Birmingham Vinegar Brewery Co. (Ltd.) *v.* Powell, L. R. (1897), A. C., 710.
[3] 38 Law Times Reps., 640 (1878).
[4] Grand Hotel Co. of Caledonia Springs (Ltd.) *v.* Wilson et al., L. R. (1904), A. C., 103.

Caledonia" but under a different brand. Although it appeared that the defendants' goods were sufficiently differentiated from those of the plaintiff to avoid confusion, Lord Davey chose to distinguish the Stone Ale case[1] on the ground that it involved manufactured articles and seems to have considered natural products as being governed by a different rule of law.

COMPANY AND TRADE NAMES.—Firm and trade names are usually registered under the companies' act[2] or as trade-marks under section 9 of the act of 1905.[3] The protection thus afforded is supplemental to the common law which protects the owner in the use of a name regardless of whether it is registered or constitutes a trade-mark if the use of a similar name misleads the public. So in an action by a company incorporated in 1821 as the "Guardian Fire & Life Assurance Co." it was held that the adoption of the name "Guardian and General Insurance Co. (Ltd.)," due to the similarity of the names, was calculated to deceive the public.[4] And relief is sometimes granted, even though the injury may be prospective. Thus in an action by Lloyd's, the well-known association of underwriters, and their agents at Southampton, an injunction was issued against Lloyds, Southampton (Ltd.), although the defendant so far had only engaged in purchasing and selling yachts and acting as ship brokers.[5] The defendant had, however, under its memorandum of association very extensive powers to carry on business of all kinds.

However, if there is no likelihood of competition, the action will not lie, even though the trade names used are identical. Thus where the plaintiff, publishers of Everybody's Magazine, sought to restrain the defendants from using the word "Everybody's" in connection with a weekly penny paper the action was dismissed on the ground that the two things were perfectly distinct and in no way likely to compete with one another.[6]

The rule in regard to the use of misleading names is the same when corporate names are involved. A corporate charter grants no immunity in the use of a deceptive name. In a case decided by the House of Lords in 1898 a decree enjoining the use of a corporate name was affirmed.[7] In this case the appellants were restrained

[1] Thomas Montgomery *v.* Thomson et al., supra.

[2] Companies' (consolidation) Act, 1908 (8 Edw., 7, ch. 69, sec. 8).

[3] 5 Edw., 7, ch. 15, supra.

[4] Guardian Fire & Life Assurance Co. *v.* Guardian & General Insurance Co. (Ltd.), 50 L. J. Ch., 253 (1880).

[5] Lloyd's & Dawson Bros. *v.* Lloyds, Southampton (Ltd.), 28 Times Law Reps., 338 Ct. of App. (1912).

[6] Ridgway Co. *v.* Amalgamated Press (Ltd.), 28 Times Law Reps., 149 (1911). See also Dunlop Pneumatic Tyre Co. (Ltd.) *v.* Dunlop Motor Co., L. R. (1907), A. C. 430, and Turner's Motor Mfg. Co. (Ltd.) *v.* Miesse Petrol Car Syndicate (Ltd.), 24 R. P. C., 531 (1907). Cf. Eastman Photographic Materials Co. (Ltd.) et al. *v.* John Griffiths Cycle Corp'n (Ltd.) et al., 15 R. P. C., 105 (1898).

[7] North Cheshire & Manchester Brewery Co. (Ltd.) *v.* Manchester Brewery Co. (Ltd.) L. R. (1899), A. C., 83.

from using the name of the plaintiff company, the court holding that the public might be misled into believing that the two companies had been consolidated.

PERSONAL NAMES.—Apparently the view taken by the English courts is that the honest use of a personal name in trade can not be enjoined, although confusion may arise due to the fact that the names are the same or so similar as to mislead purchasers. In an early case[1] the court of appeal held that where the plaintiff had for many years sold a sauce under the name "Burgess' Essence of Anchovies" the court would not in the absence of fraud restrain the defendant, his son, from selling a similar article under the same name. And in Turton *v.* Turton[2] the plaintiffs, who for many years had carried on the business of steel manufacturers under the name "Thos. Turton & Sons," were denied an injunction where the defendant, who had for a slightly shorter period of time carried on a similar business under the name "John Turton" and upon taking his sons into the partnership as "John Turton & Sons." So in a recent case[3] the court of appeal decided that inasmuch as the defendant had not attempted to imitate the mode in which the plaintiff's name was used, and as he had not acted dishonestly, an injunction would be refused, notwithstanding that he knew he was deriving some advantage from the fact that his name was the same as the well-known piano manufacturer's.

And it appears that the courts will not unqualifiedly enjoin the use of a personal name, even where fraudulent intention is established. Thus, where it appeared that the defendants adopted the name of their general manager, who held only one share of their stock, for the express purpose of securing the benefit of the plaintiff's business reputation, and in other ways attempted to imitate the latter's goods to their own advantage, the court, while restraining them from using the name in a manner likely to deceive customers, said: "We can not prohibit their using the name if they use it in a way not calculated to mislead the public."[4] But where an Irishman having changed his name several times, ultimately took the name "Pinet," the name of a well known French company dealing in boots and shoes, the incorporators of a company to whom he transferred the use of the name were enjoined from using it in a similar business to that of the plaintiff.[5]

[1] Burgess *v.* Burgess, 3 De G. M. & G., 896 (C. A., Ch. Div., 1853).

[2] L. R. (1889), 42 Ch. Div., 128. Lord Esher, in holding that since the confusion resulted from the mere use of the defendant's own name without more, no relief should be granted, said (p. 136): "Therefore upon principle, I should say it is perfectly clear that if all that a man does is to carry on the same business, and to state how he is carrying it on—that statement being the simple truth—and he does nothing more with regard to the respective names, he is doing no wrong."

[3] John Brinsmead & Sons (Ltd.) *v.* Brinsmead, 30 R. P. C., 493 (Ct. of Appeal, Ch. Div., 1913).

[4] Massam *v.* Thorley's Cattle Food Co., L. R., 14 Ch. Div., 748 (1880).

[5] F. Pinet et cie. *v.* Maison Louis Pinet (Ltd.), 15 R. P. C., 65 (Ch. Div., 1897).

DESCRIPTIVE AND GENERIC TERMS.—Words merely descriptive of the article may not be exclusively appropriated by a manufacturer, but the use of such a word may become so closely identified with a particular manufacturer's goods that its use by a rival trader will be misleading. In a case[1] where the plaintiff had for many years sold a medicinal preparation in the form of a powder under the name of "Fruit Salt," an injunction was granted restraining a competitor from selling a similar preparation in the form of tablets under the name of "Dunn's Fruit Salt and Potash Lozenges" or any other title in which the words "fruit salt" should form a part. The leading case on this point is that of Reddaway *v.* Banham,[2] decided by the House of Lords in 1896. In this case the plaintiff for many years had manufactured belting which he sold as "Camel Hair Belting," and which in point of fact was made largely of camel hair, although this was not generally known. The defendant, a former employee of the plaintiff, subsequently began the manufacture of belting on his own account stamping the same "Camel Hair Belting." The jury found that these words had come to mean the plaintiff's goods as distinguished from those of any other manufacturer, and that the use of these words by the defendant would be likely to cause confusion. From these findings the court held that the plaintiff was entitled to an injunction restraining the defendant from using the words "Camel Hair" as descriptive of or in connection with belting manufactured by them without clearly distinguishing such belting from the plaintiff's belting.

Similarly, invented words or terms used in connection with articles may be protected even though they may not be the subject of a valid trade-mark. Thus, while the word "Silverpan" was held not to be a valid statutory trade-mark, a competitor was not allowed to use the words "Silver Pan," the court holding that the words had come to mean the plaintiff's product.[3]

DRESS OF GOODS.—The imitation of labels and packages is one of the most common methods of passing off one's goods for those of another. By appealing to the eye of a customer, it is only necessary to imitate the striking features of the plantiff's goods in order to cause confusion. Thus, where the defendant sold blacking under the same name as that of the plaintiffs and in bottles with labels of the same color, size, and similar arrangement of lettering as that of the plaintiffs, an injunction was granted restraining the defendant from using any label which would mislead the public as to whose goods they were buying.[4] Name, color, or size may be a prominent feature of the label, but the question usually to be decided by the court is

[1] Eno *v.* Dunn & Co., 10 R. P. C., 261 (Ch. Div., 1893).
[2] L. R. (1896), A. C., 199.
[3] Faulder & Co. (Ltd.) *v.* Rushton (Ltd.), 20 R. P. C., 477 (Ct. of Appeal, 1903).
[4] Croft *v.* Day, 7 Beav., 84 (1843).

whether the entire dress of the article will mislead the ordinary purchaser.[1] In Lever *v.* Goodwin the defendants sold their soap in packets of the same size and shape, wrapped in the same kind of paper, with spaced printing of the same color as that of the plaintiffs, the chief difference being in the name adopted, the defendants' soap being described as "Goodwin's Self-Washing Soap" instead of "Sunlight Self-Washing." The term "Self-Washing" had been registered by the plaintiffs as a trade-mark. The court held that these words were merely descriptive, but issued an injunction as to the use of the wrappers. It was also held that while retail dealers might not be deceived, the defendants were, nevertheless, guilty of a wrongful act because they had put into the hands of the middleman the means of committing a fraud. However, a manufacturer can not be held responsible for deception caused by the deliberate fraud of the retailer to which he is not a party. So where a wholesaler sold "Royal Coffee" in tins, enameled in bright colors, and the defendants adopted the same manner of packing their "Flag Coffee," an injunction was refused, although it was contended that a retailer might conceal the name on the can and thus substitute the defendant's goods for those of the plaintiff.[2]

Selling one's goods in refilled packages or bottles bearing another's labels is fraud of such a gross nature that it is seldom attempted. The chief difficulty lies in detecting the offense. Thus, where it was proved that a defendant sold an inferior brandy for that of plaintiff's "Three Star Brandy," using the bottles of the plaintiff with the labels still attached, an injunction was granted.[3]

Dress of store.—Mere similarity in dress of establishments apparently will not support an action for passing off, but it may, however, be part of a general scheme to pass one's business or goods off for those of another. Thus in a case where the rights of two rival cab companies was involved,[4] it was charged that the defendant fraudulently secured the customers of the plaintiff by the adoption of a similar name; that the same insignia was also used and the dress of the cabmen and conductors was imitated. An injunction was granted restraining the defendant from using any conveyance bearing the name adopted, or any other names, words, or devices used in such manner as to form a colorable imitation of those used by the plaintiff. An injunction was also issued in a recent case in which the facts were

[1] Lever *v.* Goodwin, 36 Ch. Div., 1 (1887). Lord Justice Cotton, speaking for the court of appeal, said (p. 5): "There may be no monopoly at all in the individual things, but if they are so combined by the defendants as to pass off the defendants' goods as the plaintiff's, then the defendants have brought themselves within the old common-law doctrine in respect of which equity will give to the aggrieved party an injunction in order to restrain the defendants from passing off their goods as those of the plaintiffs."

[2] Payton *v.* Snelling, Lampard & Co. (Ltd.), L. R. (1901), A. C., 308.

[3] Hennessey & Co. *v.* Neary, 19 R. P. C., 36 (1901).

[4] Knott *v.* Morgan, 2 Keen's Ch., 213 (1836).

very similar.[1] The painting on the cabs was similar, and on the door of the plaintiff's cabs there was a panel on which the initials of the plaintiffs appeared in a very distinctive form. The initials "W. & G." were connected by the sign "&." To imitate more nearly the cabs of the plaintiffs, the defendant had painted on his cabs his initials "M. G." in the same form and script as the plaintiffs, with a twist or curl between the two letters that could easily be mistaken for the sign "&." Likewise, the use of signs which may mislead customers as to the identity of the store may be enjoined. So in a case where the parties had been partners in business and the defendant subsequently set up in the same line of business only a few doors from the old place, he was not allowed to use the name of the plaintiff on his shop sign in a manner deceptive to the public. It appeared that the two shops were similar in appearance, and that the defendant painted over his door "S. Pottage from Hookham & Pottage," the word "Hookham" being placed immediately over the door. It was held that while the defendant was entitled to announce to the public by this method the fact that he was formerly a member of the old firm, he could not do so in a manner calculated to cause the belief that he was carrying on the old business.[2]

And where a tradesman who had been in the employ of the plaintiffs started in business on his own account and put his own name over his shop, but on the brass plates under the windows he had engraved the word "from" in small letters and the name of the plaintiffs' firm in large letters, it was held that this was calculated to mislead the incautious, unwary, and heedless portion of the public, and an injunction was issued.[3] It was shown that when the awning was let down only the name of the plaintiff's firm was visible from the street.

IMITATION OF GOODS THEMSELVES.—As stated in the discussion of the American cases on this subject, the general rule is that there can be no monopoly in the form, color, or construction of an article in the absence of patent protection. There are cases, however, where the shape or style of an article has become so associated with it that these characteristics may not be copied. Thus, in Ripley *v.* Bandey,[4] although the plaintiff was refused relief because of laches, it was held that the defendant was guilty of passing off in manufacturing laundry blue in oval blocks, a shape which had been used for several years by the plaintiff. And where a cigar manufacturer had adopted a distinctive shape for his cigars, a competitor adopting the same

[1] W. & G. Du Cros *v.* Gold, 29 Times Law Reps., 163 (1912).
[2] Hookham v. Pottage, 27 Law Times Reps., 595 (C. A., Ch. Div., 1872).
[3] Glenny *v.* Smith, 2 Drewry & Smale's Reps., 476 (1865). See also Boswell *v.* Mathie, 11 Session Cases (4th series), 1072 (1884).
[4] 14 R. P. C., 591 (Ch. Div., 1897).

peculiar shape was enjoined on the ground that the cigars might be sold apart from the boxes so as to mislead purchasers.[1]

The manufacture and sale of articles on which the patent has expired might be mentioned in this connection. At the expiration of the patent anyone may manufacture the patented article and may sell it under the name under which it was sold by the patentee, provided that proper precautions are taken not to deceive the public as to the manufacturer. Thus, where a manufacturer made filters according to the plaintiff's patent which had expired, the court of appeal held that since the defendant had clearly designated that he and not the plaintiff was the manufacturer of the article which he had offered for sale, the plaintiff was not entitled to relief.[2] A similar result was reached in Linoleum Manufacturing Co. *v.* Nairn,[3] in which a right to the exclusive use of the word "Linoleum" was asserted, the product to which the name was attached having been covered by patents which had expired.

Another form of passing off which has been held actionable is the sale by a dealer of a manufacturer's second-grade product in such a manner as to cause purchasers to believe they were obtaining the first-grade goods of the manufacturer.[4]

Section 17. Miscellaneous.

AMERICAN DECISIONS.

In New York it has been held lawful for a steamship company, whose regular rates were reasonable, to offer special rates to merchants who would agree to ship exclusively by its vessels at such times as a rival vessel was engaged in obtaining freight or taking on cargo, and to refuse to transport freight at the reduced rates unless this condition was complied with.[5]

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[1] Elliott & Co. (Ltd.) *v.* Hodgson, 19 R. P. C., 518 (Ch. Div., 1902).

[2] Cheavin *v.* Walker, L. R. (1877), 5 Ch. Div., 850.

[3] L. R. (1878), 7 Ch. Div., 834.

[4] Spalding & Bros. *v.* Gamage, 110 Law Times Reps., 530 (C. A., 1914). Per Phillmore, L. J.: "This is a 'passing off' which is actionable. It is not the usual passing off when the man sells his own goods representing them to be those of another trader. But it is a more subtle and possibly a more injurious passing off when a man sells the second-class goods of a trader representing them as the first-class goods of that trader." See also John Jameson & Son *v.* Isaac Clarke, 19 R. P. C., 255 (1902); Teacher *v.* Levy, 23 R. P. C., 117 (1905); and Hunt, Roope, Teague & Co. *v.* Ehrmann Bros., 27 R. P. C., 512 (1910).

[5] Lough et al. *v.* Outerbridge et al., 143 N. Y., 271, 282 (1894). Per O'Brien, J.: "* * * when an individual or a corporation has established a business of a special and limited character, such as the defendants in this case had, they have a right to retain it by the use of all lawful means. That was what the defendants attempted to do against a competitor that engaged in it, not regularly and permanently, but incidentally and occasionally. The means adopted for this purpose was to offer the service to the public at a loss to themselves whenever the competition was to be met and when it disappeared to resume the standard rates, which, upon the record, did not at any time exceed a reasonable and fair charge. I cannot perceive anything unlawful or against the public good in seeking by such means to retain a business which it does not appear was of sufficient magnitude to furnish employment for both lines." Reargued and affirmed, 145 N. Y., 601 (1895), Andrews, Ch. J., and Peckham, J., dissenting. See also Investigation of Shipping Combinations under House Resolution No. 587, 62d Cong., 2d sess., hearings, vol. 2, pp. 1391–1397.

It has also been held lawful for the manufacturer of a well-known article to offer a rebate to those dealers who maintained specified prices and agreed not to sell the product of any competitor at less than said prices, although it was alleged that by reason of such contracts the business of a competitor was destroyed.[1]

Likewise it has been held lawful for a jobber to reduce the price of certain dry goods, although it was alleged that the reduction was the result of a conspiracy, was made maliciously and with the intent to injure the manufacturer, and had resulted in the cancellation of orders by other jobbers, and in depressing the market value of such goods.[2]

On the other hand the Supreme Court of Iowa held that it was actionable for a merchant to advertise sewing machines as being of the "latest patterns," "just received" and having the best attachments, at prices approximately one-half of that at which such machines were sold by a rival agent, when in fact the machines so advertised were not new and did not otherwise correspond with the advertisements, and it clearly appeared that the acts were done maliciously and with the intent to injure the plaintiff.[3]

In Louisiana, where it appeared that a foreman having power to discharge certain employees of a street railway, threatened to dismiss those who dealt with a certain grocer, and, for the same reason de-

[1] Walsh et al. *v.* Dwight et al., 40 N. Y. App. Div., 513, 516 (1899). Per Ingraham, J.: "There is nothing to prevent an individual from selling any property that he has at any price which he can get for it. Nor is there any reason why an individual should not agree that he will not sell property which he owns at the time of making the agreement, or which he thereafter acquires, at less than at a fixed price; and certainly a contract of this kind is not one which exposes the parties to it to any penalty, or subjects them to an action for damages by those whose business such a contract has interfered with."

[2] Passaic Print Works *v.* Ely & Walker Dry-Goods Co., 105 Fed., 163, 167 (C. C. A., 1900). Per Thayer, J.: "No one can dispute the right of the defendant company to offer for sale goods that it owned, and which were in its possession, whether the quantity was great or small, for such a price as it deemed proper. This was the outward visible act of which complaint is made, and, being lawful, the law will not hold it to be otherwise because of a secret purpose entertained by the defendant company to inflict loss on the plaintiff by compelling it to reduce the cost of a certain kind of its prints or calicoes.

"Nor is the complaint aided in any respect by reference to the law of conspiracy, since the only object that the defendants had in view which the law will consider was the disposition or sale of certain goods which the defendant corporation had the right to sell; and the means employed to accomplish that end, namely, placing them on the market at a reduced cost, were also lawful."

Certiorari denied by United States Supreme Court, 181 U. S., 617 (1901). Cf. Ajello *v.* Worsley, p. 461.

[3] Boggs *v.* Duncan-Schell Furniture Co. et al., 163 Iowa, 106, 114 (1913). Per Gaynor, J.: "Where there is lawful competition for gain, for supremacy in business, for the legitimate control of business, even though the purpose and effect of the competition is to drive from business competitors, yet, if the competition is lawful and carried on in a lawful way, no action will lie. There is a difference between lawful competition and simulated competition carried on with the sole purpose and intent, not of profit and gain, but of maliciously injuring others engaged in that particular business. The case before us does not present a case of lawful competition, but a case of simulated or pretended competition, designed and carried out with malice for the purpose of injury to the plaintiff in his business." Cf. Spalding & Bros. *v.* Gamage, p. 455.

manded higher rent from one of his tenants and gave another notice to quit, it was held that the grocer was entitled to damages resulting from such interference with his business, and that the defendant's conduct was not justified by the fact that another of his tenants had a grocery likely to be benefited by the diversion of the plaintiff's customers.[1]

On the other hand, where a lumber company which also operated a general store threatened to withdraw its patronage from wholesalers and jobbers who sold to a competitor engaged in the mercantile business, and threatened to discharge its employees if they dealt with him, it was held that the defendant was justified in attempting to protect and safeguard its own business interests.[2]

So in Texas, where a company engaged in the logging business refused to honor pay checks which had passed through the hands of the plaintiff, a merchant, and had threatened to discharge any employee who dealt with him, and it further appeared that the defendant company was also engaged in the mercantile business, it was held that the plaintiff had no right of action.[3]

It has also been held lawful for a manufacturer to terminate a jobbing contract at a time when the jobber had a stock of the former's goods on hand, and to notify retailers with whom the jobber had been doing business that he was no longer a distributor of its goods and that they must thereafter buy from other jobbers or distributors.[4]

In another case it was held lawful for the members of an association of publishers to agree to cut off the supply of newspapers from a news dealer unless he discontinued the distribution of handbills and circulars with his papers, where it appeared that the defendants were not seeking to injure the dealer but to protect themselves

[1] Peter Graham *v.* St. Charles Street R. R. Co. et al., 47 La. Ann., 214, 1656 (1895). And see International & Great Northern Ry. Co. *v.* Greenwood, 2 Texas Civ. App., 76 (1893); Chiatovich *v.* Hanchett et al., 88 Fed., 873 (C. C., 1898); Wesley *v.* Native Lumber Co. et al., 97 Miss., 814 (1910).

[2] Lewis *v.* Huie-Hodge Lumber Co. (Ltd.), 121 La., 658 (1908).

[3] Robison *v.* Texas Pine Land Assn., 40 S. W., 843, 844 (Texas Ct. Civ. App., 1897). Per James, C. J.: "According to plaintiff's allegations, competition in trade existed between plaintiff and defendant and it was legitimate for defendant to appropriate to itself all the customers it could command, even to the extent of driving plaintiff out of business, provided the means used for that purpose did not contravene any law or violate a definite legal right of the plaintiff. * * * Had the defendant no proper interest of his own to subserve in so doing, but had acted wantonly in causing loss to plaintiff, the rule would be different. * * * A system whereby such checks would be honored in the hands of anyone except plaintiff was calculated to insure trade at defendant's store, and diminish that of its rival; and, as plaintiff has no definite right to the public trade, he has no legal right to complain that defendant absorbed it by the manner of managing its business, and its relation with its employees."

[4] Victor Talking Machine Co. *v.* Lucker, 128 Minn., 171 (1915). Per Hallam, J.: "This was a notice by one competitor telling buyers not to do business with another. Such conduct, without more, is not actionable. One man may lawfully seek the business of a competitor and may tell the 'trade' not to buy of his competitor, so long as he indulges in no threat, coercion, misrepresentation, fraud or other harrassing methods."

by preventing him from making such use of their publications as to make him a competitor with them in the business of advertising.[1]

In Utah it has been held lawful for a telephone company to adopt the same number for its "trouble department" telephone as that previously used by a rival company, thus enabling the new company through the mistakes of its competitor's subscribers, to learn when their telephones were out of order, and to solicit their patronage.[2]

It has been held lawful for a manufacturing company to stipulate in its advertising contracts with trade journals that such contracts shall be subject to immediate cancellation upon the publication of advertisements of articles which, in the judgment of the company, infringe its patents, and in accordance with such agreement and in good faith to notify the publishers that the plaintiff's article is an infringement.[3]

In Vermont it has been held that it was not actionable for a bank maliciously to buy up a large amount of the bills or notes issued by a banking association, and from time to time to refuse to exchange them for currency but to present them for payment in large amounts in order to drain the association's vaults and keep their bills out of circulation. The court was of the opinion that the case was the ordinary one of a creditor calling upon a debtor for his pay, at a time, and at a place, and in a manner to which the debtor has no right to make objection.[4]

On the other hand it has been held that an agreement by a corporation publishing a directory, to purchase the worthless notes of a competitor for the purpose of embarrassing his business and injuring his credit by a lawsuit, and to pay a bonus to induce his printers to refuse to do his work, is ultra vires and void, and that the trustees may, at the suit of a stockholder, be enjoined from using corporate funds for such purposes.[5]

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[1] Collins *v.* American News Co. et al., 69 N. Y. Supp., 638 (Sup. Ct., 1901), affirmed, 74 N. Y. Supp., 1123. The placing of handbills, circulars, etc., in newspapers and magazines without the consent of the publisher or owner has recently been made a criminal offense in New York, New Jersey, and Pennsylvania. See p. 528.

[2] Rocky Mountain Bell Telephone Co. *v.* Utah Independent Telephone Co. et al., 31 Utah, 377, 385 (1906). Per Frick, J.: "But suppose it is true that respondent does learn of trouble in respect to appellant's telephones by the means alleged. It could not profit from this unless it can convince the subscriber, using appellant's telephone, that respondents' system is the better one, and is better calculated to serve his purpose, in that it is less liable to cause trouble. This, if competition is permissible in the telephone business, would seem to be legitimate competition." Cf. Ranft *v.* Reimers, 200 Ill., 386 (1902), and Street *v.* Union Bank of Spain and England, L. R. (1885), 30 Ch. Div., 156.

[3] H. W. Johns-Manville Co. *v.* Lovell-McConnell Mfg. Co., 212 Fed., 923 (C. C. A., 1914).

[4] South Royalton Bank *v.* Suffolk Bank, 27 Vt., 505 (1854).

[5] Colles *v.* Trow City Directory Co. et al., 11 Hun, 397, 399 (N. Y. Sup. Ct., 1877). Per Davis, P. J.: "It was no part of the corporate business to buy bad debts and dishonored notes, and still less to pay premiums to prevent the creditors of competitors from giving further credit or doing work which they might otherwise be willing to undertake. It is no answer to say that Goulding's competition was unfair; that he was selling what he did not pay for, and therefore could injure defendant's business by underselling. 'To fight the devil with fire' is sometimes said to be fair in theology and politics; but corporations are not created for such purposes and their trustees have no power to use their funds for objects of that nature."

In Standard Oil Co. et al. *v.* Doyle, which was an action by the latter charging a conspiracy to drive him out of business, the proof tended to show that a representative of the defendant company offered one of the plaintiff's customers a rebate as an inducement to return certain oil purchased from the plaintiff and threatened to ruin him in case of a refusal, and that this customer subsequently sold out his business to the local oil inspector who became a competitor of the plaintiff and used wagons furnished by the Standard Oil Co. It further appeared that Doyle's drivers were obstructed, annoyed, and harassed, and that oil was sometimes offered to his customers without charge in order to prevent his drivers from making sales; that his oil was condemned by the oil inspector although it had been inspected and reported above test in another county; that the inspector subsequently notified Doyle's customers that his oil had been condemned and that they would be prosecuted if they bought or sold it; and that the deputy oil inspector, who was also deputy clerk, issued a summons against Doyle to show cause why he should not be punished for selling unsafe oils, but that after a trial the charge was dismissed. A judgment for the plaintiff was affirmed on appeal although it was urged by the defendants that the acts complained of were legitimate, for the purpose of building up the latter's business.[1]

In another case it appeared that upon the refusal of the Crystal Oil Co. to purchase supplies exclusively from the Standard Oil Co., the latter proceeded to equip itself with tank wagons and entered into active competition in the retail oil business. Its drivers were, among other things, instructed to do business ostensibly as independent dealers, and to "go after the Crystal Oil Company." Cards furnished by the latter to its customers to be displayed by them when oil was required, were in some cases carried away by the Standard's drivers and it appeared that special efforts were made to make sales wherever such cards were displayed, sometimes permitting the buyers to suppose that they were dealing with a Crystal agent. When the Crystal Oil Co. was finally driven out of business the Standard withdrew

[1] Standard Oil Co. et al. *v.* Doyle, 118 Ky., 662, 670, 681 (1904). Per Nunn, J.: "Undoubtedly one man may by fair methods compete with a rival until by sheer force of competition, by underselling or outbidding him, his own business is built up to the detriment and ruin of his rival. The damage in such case is in the eye of the law damnum absque injuria. But a different case is presented where one seeks not only to build up his own business at the expense of a rival's, but to impair, and if possible, destroy, that rival's business by the use of unlawful means by saying and doing that which he has no lawful right to say and do, in so far as it works loss and damage to his rival. * * * If it be true, as the jury seems to have determined, that this conspiracy was formed, and in pursuance thereof the appellants fraudulently caused appellee's oils to be condemned, and willfully reported the oils to be below the legal test, when they knew or had reason to believe they were not below the test, and had appellee arrested upon the false charge of selling condemned oil, and obstructed, harassed, and annoyed appellee's drivers when delivering his oil, for the purpose of injuring and driving appellee out of the business of selling oils, we can not say that the verdict is excessive."

its wagons and drivers and gave its attention wholly to its wholesale business. Although the defendants contended that their conduct "did not transgress the bounds of legitimate competition," it was held that while they had the undoubted right to establish a competing business, they had no right, under the guise of competition, to inflict a malicious injury on the Crystal Co. or drive it out of business, intending to retire when their purpose had been effected.[1]

ENGLISH DECISIONS.

In Barley *v.* Walford a dealer in printed silk goods alleged that he had sent to the defendant a lot of handkerchiefs which he had printed with a certain pattern, and that he was about to fill other orders for handkerchiefs of the same design when the defendant, intending to defraud him and induce him to desist from printing the same, falsely represented that the pattern was copyrighted and that other parties intended to seek an injunction against him. The plaintiff further alleged that he was put to great expense in investigating the supposed claims of such other parties, that meanwhile he abstained from selling a large number of his handkerchiefs, while the defendant caused a large number of such handkerchiefs to be printed and sold them without competition. It was held by Lord Denman that a cause of action had been disclosed.[2]

In another case where it appeared that a dealer in order to attract trade advertised a piano of a certain make and class at a reduced price, and continued the publication of such advertisements after the piano had been sold, it was held by the court of appeal that the piano manufacturer was not entitled to an injunction. In explanation of his conduct the defendant stated that for a time he was prepared to take orders for the plaintiff's pianos since he knew several dealers who would supply him, and further, that it was difficult, or at all events caused additional expense, to alter the advertisement. Although the court disapproved of the defendant's conduct and expressed the opinion that the advertisement was not such as ought to have been published and that great negligence had been shown with respect to its withdrawal, it denied the injunction, being of opinion that as a general rule any person, acting honestly, may sell or offer for sale at any price whatsoever goods of which he is not the owner but which he expects or hopes to acquire, and further, that although the advertisements amounted to a representation that the defendant had in his possession a piano of the description advertised,

[1] Dunshee *v.* Standard Oil Co. et al., 152 Iowa, 618 (1911). And see Dunshee *v.* Standard Oil Co. et al., 165 Iowa, 625 (1914). Cf. Boggs *v.* Duncan-Schell Furniture Co. et al., p. 456.

[2] 9 A. & E., 197 (Q. B., 1846).

such misrepresentation was not the cause of damage to the plaintiff and consequently gave no right of action.[1]

In a recent Scottish case it appeared that a body of harbor trustees, incorporated by an act of Parliament, were vested with authority to operate ferries within certain limits and had power in the event of a deficiency in ferry revenues to increase the rates payable by shipowners using the harbor. On several occasions when the steamers were not required for ferry traffic they were hired out by the trustees for excursions beyond the ferry limits. A firm of shipowners, part of whose business consisted in hiring out excursion steamers, brought an action to restrain the trustees from so using their steamers, claiming, among other things, that the rates charged were altogether inadequate and such as no private shipowner could compete with, that the excursions would result in a loss to the trustees, and that such acts were ultra vires and interfered with their business. It was held that the acts complained of were ultra vires, and as it appeared that the complainants had by statute an interest in the trust fund, contributed as harbor ratepayers, and had certain statutory rights with respect to the management and control of the undertaking as electors and possible trustees, it was further held that they were entitled to bring the action.[2]

In another case, where a stockholder of a railway sought to enjoin the company from running excursion boats to a certain place on the ground that this was beyond the powers of the corporation, and it appeared that the plaintiff was a large stockholder in a steam packet company which was prejudiced by the acts complained of and, further, that the packet company directed the suit and indemnified the plaintiff against costs, the lord chancellor treated the suit as an imposition on the court and dismissed it accordingly.[3]

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[1] Ajello *v.* Worsley, L. R. (1898), 1 Ch., 274. Cf. Passaic Print Works *v.* Ely & Walker Dry Goods Co. et al., p. 456; Rex *v.* Jakeman, 24 Cox's C. C., 153 (1914) and Winchester Repeating Arms Co. *v.* Butler Bros., 128 Fed., 976 (D. C., 1904).

[2] D. & J. Nicol *v.* Trustees of the Harbour of Dundee, 1914, Session Cases, 374, affirmed, L. R. (1915), A. C., 550, 559, 561, Viscount Haldane, L. C.: "I do not think that the respondents could have made their claim successfully on the mere foundation of injury to their interests as rival traders. It appears to me that their real case is that they are beneficially and individually interested in the administration of property and the execution of powers to be carried out in strict accordance with the terms and limits prescribed by the Act of Parliament under which the incorporated trustees derive their capacity and the respondents their beneficial rights." Lord Dunedin: "In the phraseology of Scottish law, when a complainer can only say that he is a rival trader and nothing more, he qualifies an interest but not a title." Cf. Stockport District Waterworks Co. *v.* Mayor, etc., of Manchester et al., 9 Jurist (N. S.), 266 (1863); Pudsey Coal Gas Co. *v.* Corporation of Bradford, L. R. (1873), 15 Eq., 167; and Railroad Co. *v.* Ellerman, 105 U. S., 166 (1881).

[3] Forrest *v.* The Manchester, Sheffield and Lincolnshire Ry. Co., 4 De Gex, F. & J., 126 (1861).

CHAPTER VIII.

FEDERAL STATUTES RESPECTING UNFAIR METHODS OF COMPETITION.

Section 1. Introductory.

This chapter deals with certain Federal statutes which specifically prohibit certain methods of competition or which, under the construction given them by the courts, may be invoked to prevent the use of such methods. These statutes are the Sherman Antitrust Act, the Federal Trade Commission Act, the Clayton Act, and the Act to Regulate Commerce. While the Federal Trade Commission Act is undoubtedly the most comprehensive in this respect, it has not yet been applied. On the other hand, the Sherman Act has been interpreted by the courts with respect to various methods of competition, either through judicial decisions or decrees. The opinions and decrees under the Sherman Act are set forth without attempting to determine how far such practices are unfair methods of competition within the meaning of the Federal Trade Commission Act. Such statutes as the Pure Food and Drugs Act, which appear to have been enacted primarily to protect the consumer from fraud and imposition, but which incidentally protect the honest dealer from the fraudulent competition of unscrupulous rivals, are not included in this chapter, nor are the statutes and decisions relating to trademarks, these latter being fully treated in comprehensive textbooks and reference works.

DECISIONS UNDER THE SHERMAN LAW WITH RESPECT TO METHODS OF COMPETITION.

Section 2. General statement.

Although the Sherman Antitrust Act does not in terms condemn unfair competition, certain classes of contracts or specific competitive practices have been complained of in proceedings arising under the act as tending to establish a restraint of trade or an attempt to monopolize. In some instances the courts have passed upon the legality of those practices in their decisions; in others they have been prohibited in the decrees, but without any comment by the courts upon the legality of the particular devices or practices.

The following competitive methods have been passed on in the reported decisions: Price cutting, the use of "fighting ships," "bogus independents," exclusive and "tying" contracts, inducing breach of

contract, enticing employees from the service of competitors, bribery and espionage, and the boycott by trade associations, accompanied by the black list.

Section 3. Price cutting.

In United States *v.* Great Lakes Towing Co. et al.,[1] the court referred to the combination represented by the towing company as "a monopoly created by abnormal and unfair means," specifying as one of these, "unfair rate wars," and stated that "stringent provisions against unfair rate cutting" were contained in the decree.[2]

In reviewing the evidence of a conspiracy admitted by the trial court in a criminal prosecution of the president and certain officers and agents of the National Cash Register Co., the circuit court of appeals took occasion to comment adversely upon two methods practiced by the defendants in competition with the American Cash Register Co. These methods were (1) cutting prices on machines made by the American Company and secured by the National in the course of business, and (2) cutting prices on their own machines. The court said:

> The method of attack was to prevent him [an employee of the American Co.] from making sales of American machines and to displace such as he made. The way in which the former was attempted was by offering Hallwoods [the name of the American Co.'s machine], owned by the National Co. at low prices—i. e., 30 cents on the dollar, in competition. * * * The way in which the displacements were brought about was by offering the regular National machines on unusual terms. Both methods were unfair.[3]

After the judgment of the Supreme Court in United States *v.* American Tobacco Co. et al.,[4] the Circuit Court for the Southern District of New York[5] considered a request that the defendant companies be enjoined "from giving away or selling at or below the cost of manufacture and distribution any of its products, from giving rebates, allowances, or other special inducements to purchasers or users, and from refusing to sell to any jobber any special brand he may require." This request, however, was denied by Lacombe, J., who said:

> The record in this case shows that these are the common methods of the tobacco business, practiced by all alike. It is only by giving away samples, or by offering on favorable terms, irrespective of cost, that new brands of tobacco products can be introduced or old brands extended into new territory. All other companies are free to employ these methods, which are obnoxious to no statute, and there is no reason why the fourteen companies should be forbidden to do so.

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[1] 217 Fed., 656, 659–661 (D. C. 1914). This case is now pending in the U. S. Supreme Court.

[2] See decree, pp. 479, 481, 484.

[3] Patterson et al. *v.* United States, 222 Fed., 599, 636 (C. C. A., 1915).

[4] 221 U. S., 106 (1911).

[5] U. S. *v.* American Tobacco Co. et al., 191 Fed., 371, 381 (1911).

Section 4. Discriminations.

The defendants in United States *v.* Pacific & Arctic Co.[1] were indicted under sections 1 and 2 of the Sherman law for conspiring to restrain trade and commerce in the business of transportation in freight and passengers between various ports of the United States and Canada, and Alaska, and for monopolizing trade and commerce in the same business between the same ports. The indictment alleged in substance that the defendant steamship companies operating between Canadian and United States ports and Skagway, Alaska, established through routes and joint rates with the defendant wharves company, which owned the only wharf facilities at Skagway, and with the defendant railroad company which owned the only railroad extending from Skagway to the Yukon River; that by an agreement between the parties the railroad company refused to make any through route or joint rate with independent steamship companies, and charged rates between Skagway and Yukon River points which were much higher than the railroad's pro rata of the through route; and that the wharves company charged $2 a ton for freight if shipped on a vessel not owned by one of the defendant companies as against $1 a ton if shipped on a vessel owned by one of the latter. The defendants demurred to the indictment, and in support of the demurrer it was urged that since the defendants had a common-law right to select their connections and to refuse to establish through routes and joint rates with others no offense was charged. The court held, however, that the indictment showed the existence of something more than a mere attempt on the part of the defendants to exercise these rights; and that since it alleged that the agreement in question had been made for the purpose of restraining trade and destroying competition, it was not demurrable.

Section 5. "Fighting ships."

In United States *v.* Hamburg-American Steamship Line et al.,[2] Lacombe, circuit judge, said in part:

> One of the matters complained of is what is called in the testimony the providing of "fighting ships." Upon occasions when some steamship owner or charterer, not a member of the combination, has put a vessel on a berth adjoining one from which vessels of a member of the combination were about to sail, and has offered to carry passengers at a lower rate than that asked by such member, an extra vessel has been put on, ostensibly by one of the lines in the combination, but really by the combination itself, at the same or a lower rate, and all have co-operated to furnish such a "fighting ship" and thereby keep out the competitor. This seems clearly to be within the prohibition of the act. * * *

[1] 228 U. S., 87 (1913).
[2] 216 Fed., 971, 973, 974 (D. C., 1914).

The Allan Line and Canadian Pacific Line withdrew from the fighting ship agreement before the bill was filed. As to both these defendants the bill is dismissed. As to the other defendants injunction will issue against the continuance of the "fighting ships,"[1] and as to the other prayers for relief the bill is dismissed.

Dismissing the Government's petition against the American-Asiatic Steamship Co.[2] and other members of the Far Eastern Steamship Conference, the same court observed:

Defendant's conference agreement contains a provision for "fighting ships." If there were evidence that any steps had ever been taken towards putting one on, we should be inclined to grant an injunction similar to the one we granted in United States *v.* Hamburg American Co. et al. (D. C.) 216 Fed., 971; but since there is no such evidence in this case, we see no reason for granting that relief.

Section 6. "Bogus independents."

In Monarch Tobacco Works *v.* American Tobacco Co. et al.,[3] an action for treble damages, it was alleged, among other things, that the American Tobacco Co. acquired control of the Nall & Williams Tobacco Co., which fact it kept secret; and that by falsely pretending that the Nall & Williams Tobacco Co. remained independent, and by other means set forth, the defendants carried out the conspiracies and combinations complained of and competed under false pretenses with the plaintiff in Indianapolis, Minneapolis, Cumberland, and Louisville, greatly to the plaintiff's injury. The court, considering the defendants' demurrer, said in part:

It was contended that it was not unlawful merely to keep one's business affairs secret, nor for one corporation to obtain a controlling interest in another, nor merely to compete with a rival for trade and by mere competition to drive him out of business, nor to offer better terms and inducements than a rival in business offered, and we are by no means inclined to deny either of those propositions in the abstract, for neither is in terms forbidden by the act, nor, possibly, by any moral consideration; but, as we have seen, the seventh section of the act, in most general language, provides that "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act" shall have a right to recover therefor, and the rulings of the Supreme Court to which we have called attention seem clearly to show that even lawful acts may become agencies of wrongdoing if the motive of doing those acts be to carry into effect a combination made illegal under the statute, and particularly if doing them does in fact effectuate the purposes of the unlawful scheme.

Commenting on the secret ownership of D. M. Osborne & Co. by the International Harvester Co., Smith, circuit judge, observed:[4]

When the D. M. Osborne & Co. purchase was made, while the International bought all the stock, it permitted the Osborne Co. to continue to appear to be in-

[1] See decree, p. 483.
[2] United States *v.* American-Asiatic S. S. Co. et al., 220 Fed., 230, 235 (D. C., 1915).
[3] 165 Fed., 774, 781 (C. C., 1908).
[4] U. S. *v.* International Harvester Co., 214 Fed., 987, 992 (D. C., 1914).

dependent. It is claimed that this was done to enable the Osborne Co. to collect its bills receivable, which were not acquired by the International. There was commercial advantage in claiming not to be associated with the International. Many persons were opposed to buying from it, and for two years the Osborne Co. persistently advertised that it was independent.

While under the old-time law of warranty it might be justifiable for the Osborne Co. to conceal its relations with the International, there can be no excuse for the affirmation upon its part that it was independent after it had been acquired by the International.

"The seller may let the buyer cheat himself ad libitum, but must not actively assist him in cheating himself."

The International had bought all the stock of the Osborne Co., and it had been transferred to a trustee for it, and there was, in the fact that the Osborne Co. might better collect its bills receivable, no basis to justify the International in making a contract under which the Osborne Co. could continue to advertise falsely that it was an independent concern, when it had in fact been merged with the International. It is safe to say that from January, 1903, the competition of the Osborne Co. was in name only and did not exist in fact.

What has been said of the Osborne purchase is true in principle of purchases made by the International of the Keystone Co., the Minnie Harvester Co., and the Aultman-Miller plant.

Section 7. Exclusive dealing.

REBATES TO INDUCE EXCLUSIVE DEALING.—It has been urged in a number of cases that contracts which provide for the payment by a vendor of a deferred rebate to such purchasers as deal only in his goods are in violation of the Sherman law. It was early decided by the Federal Circuit Court for the Southern District of Ohio,[1] that contracts of this description did not contravene the act. The Distilling & Cattle-Feeding Co. promised to pay a rebate to those who purchased its distillery products exclusively for a period of six months and who would not sell the same at prices less than those fixed by the company. It had been previously decided by two other courts, on the same facts, that such an arrangement did not amount to a contract to purchase exclusively from the cattle-feeding company,[2] and in this case the court took the same view, but said that, granting that it did constitute a contract to purchase exclusively from the distilling company, it was not an attempt to monopolize nor did it operate to restrain trade within the meaning of the Sherman law. The following is an excerpt from the opinion by Jackson, J.:

* * * there was nothing in such an agreement unlawful or in contravention of the statute. The promise of a rebate, as an inducement for exclusive trading, certainly does not constitute an "attempt to monopolize," when the purchaser is left at liberty to buy where he pleases, and when all other sellers of the article are left unrestrained in offering the same, or greater, inducements.

[1] In re Greene, 52 Fed., 104, 117, 118 (1892); see also Olmstead v. Distilling & Cattle-Feeding Co., 77 Fed., 265 (C. C., 1896).

[2] In re Corning, 51 Fed., 205 (D. C., 1892); In re Terrell, 51 Fed., 213 (C. C., 1892).

As to the remaining condition upon which the rebate was to be payable, the same observation may be made. The purchasers were placed under no contractual or other restraint in respect to the price at which they should sell. They were simply offered a rebate, as an inducement not to undersell the vendor's distributing agents, two of whom were located at Boston, Mass. The arrangement relied on, considered either in detail or as a whole, involved no "attempt to monopolize any part of the trade or commerce among the States." * * * It is well settled that contracts in general restraint of trade are contrary to public policy, and therefore unlawful. The arrangement under consideration can not possibly be considered as one in general restraint of trade. Where the restraint is partial, either as to time or place, its validity is to be determined by its reasonableness and the existence of a consideration to support it. The question of its reasonableness depends on the consideration whether it is more injurious to the public than is required to afford a fair protection to the party in whose favor it is secured. No precise boundary can be laid down as to when, and under what circumstances, the restraint would be reasonable, and when it would be excessive. * * * In the present case, the arrangement treated as a contract was founded upon a valid consideration, and only secured to the vendors a reasonable protection in their business.

The giving of a deferred rebate by steamship lines in consideration of exclusive patronage was recently declared lawful by the district court for the southern district of New York in the Government's suit against the Prince Line, Hamburg-American Line, and other members of the Brazilian Steamship Conference, Lacombe, J., saying:

It is contended that the system of rebates adopted by the combination was a restraint of trade. Rebates at a stated percentage were given to exclusive shippers. Their payment was deferred so that it could be determined at the close of a rebate period whether the shipments of the concern asking for it had really been exclusive. It is, of course, desirable for a shipper to know in advance what rates he is to be charged; in like manner, it is desirable for a carrier to know as definitely as it can what amounts of cargo it may expect it will have to handle in a given period. These rebates were not secret, nor were they confined to a favored few; they were uniform, were open to all, and all were invited to avail of them. The arrangement is probably as old as trade itself. One natural result of it would seem to be stability in sailings and service—both desirable for trade—which might not otherwise be maintained.[1]

Still more recently, in Wilder Manufacturing Co. *v.* Corn Products Refining Co.,[2] the validity of a contract or arrangement for exclusive dealing entered into in consideration of a promised rebate was upheld by the Supreme Court. This was an action by the plaintiff refining company to recover the purchase price of goods sold to the defendant manufacturing company. It appeared that before the sale in question was consummated, the plaintiff, in conformity with a so-called profit-sharing scheme which it had devised, offered in writing to pay to the defendant a certain percentage on the amount of purchases made by the latter in any one year, payment to be made

[1] United States v. Prince Line (Ltd.) et al., 220 Fed., 230, 233 (D. C., 1915).
[2] 236 U. S., 165, 172, 173 (1915).

at the end of the following year, provided that during the two years the defendant dealt with no one but the plaintiff.[1] The defendant sought to avoid paying for the goods on the ground that the plaintiff was a combination in violation of the Sherman law and that the profit-sharing arrangement referred to was merely a means adopted by it to perpetuate its monopoly, and hence was illegal. In addition to this attack upon the validity of the condition of exclusive dealing, a claim for a percentage of the profits for the year 1908 was also made by the defendant. The Supreme Court held that the fact that the plaintiff was an unlawful combination could not be taken advantage of by the defendant in this action, and that therefore the defense and counterclaim must fail, since the profit-sharing scheme was not in itself illegal. After holding that the status of the plaintiff company must be left out of consideration, the Chief Justice said:

> The case therefore reduces itself to the question whether the contract of sale was inherently illegal so as to bring it within the also elementary rule that courts will not exert their powers to enforce illegal contracts or to compel wrong-doing. The only suggestion as to the intrinsic illegality of the sale results from the averments of the answer as to the offer of a percentage of profits upon the condition of dealing exclusively with the Refining Company for the following year and the clause to the effect that the goods were bought by the Manufacturing Company for its own use and not for resale. But we can see no ground whatever for holding that the contract of sale was illegal because of these conditions.

It may well happen, however, that under certain circumstances and conditions the use of such contracts will violate the Sherman law. This proposition is well illustrated by United States *v.* Great Lakes Towing Co.[2] In that case it appeared that the defendant company, which was a combination of a number of previously competitive towing companies, owned or controlled practically all the boats operating at 14 important lake ports and that soon after its formation, it had (in the language of the court) adopted

> a system of exclusive contracts, by which, in consideration of the vessel owners employing *throughout the entire season* the towing company's *tug and wrecking* service *at all ports* covered by its tariffs (so far as the vessel owner had occasion for such service), a large discount was given from tariff rates. In 1910 a flat discount of 20 per cent. was given on all bills. The discount was at no time less than 20 per cent. and in later years it varied with the class of service, ranging in 1910 from 20 per cent. on lake towing, boiler work, wrecking service, harbor towing of line boats, and first-class coarse-freight carriers, to 30 per cent. on lumber boats. No discounts were allowed except under such exclusive contracts. The vessel owner, moreover, was guaranteed that his con-

[1] See also the petition in United States *v.* Corn Products Refining Co. (D. C., southern district, N. Y., 1913), pp. 20–21.

[2] 208 Fed., 733, 738, 744 (D. C., 1913).

tract rates, taken together, should not exceed the sum of the "cut rates" made to meet competition. * * *

In holding the defendant an unlawful combination in violation of the Sherman law, the court said with reference to the legality of these contracts:

Even competitive practices, of a nature which as between business rivals standing practically on equal terms may be normal and lawful, yet when employed by a powerful monopolistic combination with the ability to crush, and for the purpose of crushing, a weak rival, may become abnormal and unlawful. It needs no discussion to demonstrate that complete unification of the towing and wrecking facilities at 14 principal ports, accompanied by restraints with respect to competition imposed upon the sellers of towing properties in excess of the legitimate protection necessary to the preservation of the business purchased, excessive restrictions against competition under joint operating contracts and on sales of tugs, bitter rate wars, and a system of exclusive contracts with customers such as is found here, all adopted or engaged in for the purpose of effectuating monopolistic control, are abnormal methods of doing business and eliminating competition, and that a restraint of natural competition by such means is undue restraint. * * *

When the decree in this case was entered exclusive contracts were specifically prohibited.[1]

Again, in 1914, the court characterized the combination represented by the towing company as "a monopoly created by abnormal and unfair means," referring, among other things, to "the system of exclusive contracts by which vessel owners who employ throughout the entire season the towing company's tug and wrecking service, at all the ports covered by its tariffs (so far as the vessel owner had occasion for such service), receive a large discount from tariff rates, which is denied to all others."[2]

REFUSAL TO DEAL SAVE ON EXCLUSIVE TERMS.—In Whitwell *v.* Continental Tobacco Co. et al.,[3] which was an action to recover treble damages under section 7 of the Sherman law, it was alleged that the defendants refused to sell their manufactured products to the plaintiff at prices which would enable him to resell them at a profit unless he refrained from buying, selling, or handling tobacco made by other manufacturers. The plan was to make an allotment to each purchaser much in excess of the amount which he would be able to sell, but if he refrained from handling the goods of competitors his allotment was reduced to the amount he could dispose of, and prices were reduced, thus making a profit possible. Such conditions amounted in effect to a refusal to sell to the plaintiff unless he purchased only from the defendants. A judgment for the defendants

[1] See p. 484.

[2] United States *v.* Great Lakes Towing Co. et al., 217 Fed., 656, 659, 660 (D. C., 1914); see decree, pp. 484, 486.

[3] 125 Fed., 454, 461, 463 (C. C. A., 1903).

on demurrer was affirmed, the court being of the opinion that the company had—

* * * the right to select their customers, to sell and to refuse to sell to whomsoever they chose, and to fix different prices for sales of the same commodities to different persons. In the exercise of this right they selected those persons who would refrain from handling the goods of their competitors as their customers, by selling their products to them at lower prices than they offered them to others. There was nothing in this selection, or in the means employed to effect it, that was either illegal or immoral. It had no necessary effect to directly and substantially restrict free competition in any of the products of tobacco, and it did not unlawfully restrain interstate commerce, because it in no way restricted the exercise of the rights of the competitors of the tobacco company to fix the prices of their goods and the terms of their sales of similar products according to the dictates of their respective wills.

As to whether the acts of the defendants constituted a violation of section 2 of the Sherman Act the court said:

* * * An attempt to monopolize a part of interstate commerce which promotes, or but indirectly or incidentally restricts, competition therein, while its main purpose and chief effect are to increase the trade and foster the business of those who make it, was not intended to be made, and was not made, illegal by the second section of the act under consideration, because such attempts are indispensable to the existence of any competition in commerce among the States.[1]

On the other hand, in United States *v.* Keystone Watch Case Co.,[2] a refusal to deal save on exclusive terms was held illegal. There the defendant company, which had acquired the plants, business, and good will of several large manufacturers of watchcases, sent a circular to the most prominent jobbers in the United States, which contained, among other things, the following statement:

And, further, we desire that the jobbers to whom we sell our goods bearing the following trade-marks * * * shall not deal in any watchcases other than those manufactured by us.

Some of the jobbers assented to the company's wishes and with more or less reluctance gave up buying from other manufacturers, while the jobbers who refused to assent were cut off from the Keystone product altogether unless they obtained it surreptitiously. As to the above-mentioned circular, Circuit Judge McPherson said:

We regard it, not as a request, but as a threat; and not as an empty threat, but as a real menace from a strong manufacturer. The defendant company attempts to justify both the circular and its own conduct before and after the circular was issued, by the argument that the selected jobbers were its "exclusive agents," and therefore were properly burdened with any conditions to which they might agree. But the relation of principal and agent did not exist between the company and the jobbers. They were not agents, paid for their services by salary or commission, and owing a duty to report and account;

[1] See also First National Bank of Jeannette, Pa., *v.* Missouri Glass Co., 152 S. W., 378 (St. Louis Ct. of Appeals, 1912).

[2] 218 Fed., 502, 511, 512 (D. C., 1915).

they were merely customers of the defendant company, who bought its unpatented cases by a transaction of outright purchase, and thereby took a complete title to the cases and acquired an unrestricted right to sell. And, moreover, it should be observed that they were already established customers, not only of the defendant company, but also of its competitors, and had already become trade outlets for every manufacturer of cases whose wares they had been accustomed to buy. Now, what the defendant company did was either to close these already existing and already utilized outlets, or to narrow them materially, so far as the cases of its competitors were concerned; and we think the proposition need not be discussed that this was pro tanto a direct and unlawful restraint of trade.

PATENTED ARTICLES.—In general, patent license agreements limiting the licensee's right to manufacture, sell, or use articles other than those supplied by the licensor have been held justified by the patent laws and not in contravention of the Sherman Act. Thus in Bement *v.* National Harrow Co.[1] an agreement by the defendant not to manufacture or sell any float spring-tooth harrows other than those which it had made under its patents before assigning them to the plaintiff or which it was licensed to manufacture and make under the terms of the license, except such other style and construction as it might be licensed to manufacture and sell by the plaintiff, was held not to be a violation of the antitrust act. The Supreme Court of the United States said:

> The plain purpose of the provisions was to prevent the defendant from infringing upon the rights of others under other patents, and it had no purpose to stifle competition in the harrow business more than the patent provided for, nor was its purpose to prevent the licensee from attempting to make any improvement in harrows. It was a reasonable prohibition for the defendant, who would thus be excluded from making such harrows as were made by others who were engaged in manufacturing and selling other machines under other patents. It would be unreasonable to so construe the provision as to prevent defendant from using any letters patent legally obtained by it and not infringing patents owned by others. This was neither its purpose nor its meaning.[2]

But where contracts for exclusive dealing are entered into for the purpose of restraining trade and destroying competition, and are not necessary for the proper protection of the patents which form their subject matter, they are in violation of the Sherman law. This is well illustrated by the case of Standard Sanitary Manufacturing Co. *v.* United States.[3] In that case manufacturers producing 85 per cent of the enameled-ironware output in the United States combined and agreed not to deal with any jobbers unless they in turn agreed not to purchase, sell, advertise, or solicit orders for, or in any way handle or deal in, sanitary enameled ironware of any manufacturer other than those in the combination. The Supreme Court held that both the combination and the contracts for exclusive

[1] 186 U. S., 70, 94 (1902).
[2] See also United States Seeded Raisin Co. *v.* Griffin & Skelley Co., 126 Fed., 364 (1903).
[3] 226 U. S., 20 (1912).

dealing were in violation of the Sherman law in spite of the fact that the subject matter of the contracts was patented articles.[1]

EXCLUSIVE AGENCIES.—In Virtue *v.* Creamery Package Manufacturing Co. et al.,[2] an action for treble damages under section 7 of the Sherman law, it was alleged that one of the methods of eliminating competition was through a contract by which the Owatonna Co., one of the defendants, gave to the Creamery Package Manufacturing Co., another defendant, the exclusive sales agency for the former's patented machines. Concerning this contract the Supreme Court of the United States said:

> The Owatonna Co. did nothing more in its contract with the Creamery Package Manufacturing Co. than to make that company its exclusive sales agent, and this was no violation of law. * * * patent rights may be conveyed partially or entirely, and the monopoly of use, of manufacture or of sale is not one condemned by law.

In United States *v.* Hamburg-American Steamship Line et al.[3] Lacombe, J., said in part:

> Much is made in argument of the circumstance that members of the combination employ only agents who will agree to confine their business to selling passage tickets for such members. When the deplorable conditions which existed before this method of business was adopted are considered, it would seem that such an arrangement has greatly benefited the traveling public, especially the more ignorant class of many different nationalities which travels in the third class or steerage. Moreover, dealing as it does merely with the control of defendant's agents, who are free to accept or decline such agency, it is analogous to the case which was presented in United States *v.* Periodical Clearing House[4] * * * where, upon the question whether or not such control of agents was or was not within the act, this court was divided in opinion and dismissed the bill. No attempt was made to review that decision on appeal. It is thought, therefore, that complainant has not shown itself entitled to relief on this branch of the case.[5]

Section 8. Use of certain articles as a condition of the purchase or use of other articles.

License agreements which restrict the right of the licensee in the use of unpatented articles in connection with the patented article which is the subject of the license are held justifiable under the patent laws. The plaintiff in Heaton-Peninsular Button Fastener Co. *v.* Eureka Specialty Co. et al.[6] was the owner of several patents relating to the art of fastening buttons to shoes with metal fasteners. It sold the machines upon the condition that they were to be used only with fasteners made by the plaintiff. Such condition was made known to the purchaser by means of a metal plate attached to the machine.

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[1] See decree, p. 484.
[2] 227 U. S., 8, 37 (1913).
[3] 216 Fed., 971, 974 (D. C., 1914).
[4] Not reported, as no opinions were filed.
[5] Cf. The Lloyd Sabaudo *v.* Cubicciotti, 159 Fed., 191 (C. C., 1908); and Mogul Steamship Co. *v.* McGregor, Gow & Co., p. 404.
[6] 77 Fed., 288 (C. C. A., 1896).

The defendant manufactured and sold other staples to be used with the machine, and it was alleged that it was guilty of contributory infringement. An injunction was granted, the court holding that a purchaser of the plaintiff's machine was, in effect, a mere licensee, and the use of the machine contrary to the condition would not only be a breach of contract but an infringement of the patent monopoly, to restain which an injunction would lie. No appeal was taken in the above case, and the question appears not to have been decided by the Supreme Court of the United States until 1912, when Henry *v.* A. B. Dick Co.[1] came before that court. The facts in this case are similar to those in the button-fastener case in that the articles to be used with the complainant's machine were not patented. The Dick company sold a patented device with the restriction that it should be used only with the stencil, ink, and other supplies made by the company. The defendant Henry sold ink to a purchaser of the machine with the knowledge that it would be used in violation of the condition, whereupon the Dick company brought an action for infringement. The question, "Did the action of the defendants constitute contributory infringement of the complainant's patent?" having been certified to the Supreme Court by the circuit court of appeals was decided in the affirmative by a divided bench (4 to 3). Justice Lurton, in delivering the opinion of the court, said in part:

* * * The property right to a patented machine may pass to a purchaser with no right of use, or with only the right to use in a specified way, or at a specified place, or for a specified purpose. The unlimited right of exclusive use which is possessed by and guaranteed to the patentee will be granted if the sale be unconditional. But if the right of use be confined by specific restriction, the use not permitted is necessarily reserved to the patentee. If that reserved control of use of the machine be violated, the patent is thereby invaded. This right to sever ownership and use is deducible from the nature of a patent monopoly and is recognized in the cases. * * *

* * * there is no difference, in principle, between a sale subject to specific restrictions as to the time, place or purpose of use and restrictions requiring a use only with other things necessary to the use of the patented article purchased from the patentee. If the violation of the one kind is an infringement, the other is also.[2]

Section 9. Inducing breach of competitors' contracts.

The defendants in United States *v.* Patterson et al.,[3] which was a criminal prosecution for an alleged violation of the Sherman Law, requested an instruction to the effect that it was lawful for them in competition—

to sell or offer and try to sell National cash registers to persons who had bought and owned competing cash registers in exchange at such price as was satisfactory to the parties.

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[1] 224 U. S., 1, 24, 25, 35 (1912).

[2] See also United Shoe Machinery Co. *v.* La Chapelle, 99 N. E., 289 (Mass., Sp. Ct., 1912).

[3] 222 Fed., 599, 650 (C. C. A., 1915).

The circuit court of appeals refused the request, being of the opinion that it was unlawful for the defendants to do as stated in the instruction—

> if the doing thereof involved the purchaser and owner of the competing cash register breaking his contract with the competitor in any particular, or was done for the purpose of driving the competitor out of the cash-register field. One competitor has the right to try to sell by fair means all of his goods that he can, and if the effect of his selling is to drive another competitor out of the field he is not to blame. But it is wrong for one competitor to want to drive another competitor from the field by unfair or illegal means, and to take steps to that end, so that he may have the field free from such competition and thereby be enabled to sell his goods.

Section 10. Enticement of employees.

The American Banana Co. brought an action under section 7 of the Sherman Act against the United Fruit Co.,[1] alleging, among other things, that the defendant enticed, or sought to entice away the plaintiff's employees, and oppressed, or sought to oppress, such of its own employees as presumed to buy stock in the plaintiff company. With respect to these charges Hough, J., observed:

> * * * These proceedings, however unfair and immoral, are not in and of themselves forbidden or declared to be unlawful by the Sherman act, and I do not think that a cause of action can be built upon these acts alone. I can not regard it as more than a statement of evidence, which may well be used in explaining or proving the operation if not the formation of the alleged combination and monopoly.[2]

Section 11. Bribery and espionage.

Before entering the final decree in United States *v.* American Tobacco Co. et al. the Circuit Court for the Southern District of New York[3] considered a request to enjoin the defendants "from espionage on the business of any competitor, from bribery of employees of such competitor, and from obtaining information from any United States revenue official."[4] Lacombe, J., denied the request, saying:

> Why any one individual or corporation engaged in this business may not acquire such information as he or it can legitimately obtain from private or public sources as to the business of a competitor we fail to see. When illegitimate methods are proved, they may be dealt with.

Section 12. Boycotting and blacklisting by trade associations.

Boycotts of dealers who do not conduct their business in accordance with the wishes of trade associations have been specifically condemned by the courts.

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[1] 160 Fed., 184, 189 (C. C., 1908).

[2] A judgment dismissing the complaint was affirmed by the circuit court of appeals (166 Fed., 261) and the Supreme Court (213 U. S., 347). This feature of the case, however, was not discussed.

[3] 191 Fed., 371, 381 (C. C., 1911).

[4] See Record (C. C. So. Dist. N. Y.), Vol. II, pp. 326–327, and brief for the United States in the Supreme Court, p. 195; also United States *v.* Standard Oil Co. (C. C. E. D. Mo.); Brief of facts and argument for petitioner, Vol. II, pp. 422–428.

In Mines *v.* Scribner et al.,[1] which was an action brought under section 7 of the Sherman Act, the facts, as stated by the court, were as follows:

> Defendants, with others, became members of the American Publishers' Association, whereby 90 per cent of the book business of the country was controlled. A rule was adopted and agreed to all around that they would not sell to anyone who cut prices on copyrighted books, nor to anyone who should be known to have sold to others who cut prices. A blacklist was to be kept, containing the names of such persons, and no one on that blacklist could buy any books of anybody in the scheme. Plaintiff got on the blacklist, could not buy, and was thereby injured, and claims his treble damages.

Platt, J., overruled a demurrer to the declaration, saying:

> It is true that this scheme does not prevent each publisher from putting such price as he sees fit upon his copyrighted book; but it compels jobber and retailer to stand by that price, whatever it may be, and if it is broken in any instance it puts such person out of business. It is not content with refusing to deliver any more copies of the particular book upon which he cuts the price, but it closes him out of all dealings on any and every book, copyrighted or not.
>
> The copyright law can not help the defendants, because, in the first place, the restraint is not confined to copyrighted books, and, if it were, it can not be so that the right given a single publisher to do as he pleases with his copyrighted book can be extended, so that he can combine with other owners of copyrights and permit his book to be subject to the rules laid down by the united owners.[2]

A similar principle was involved in Straus *v.* American Publishers' Association.[3] That was an action originally instituted in the Supreme Court of New York praying an injunction to restrain the defendants from interfering with the purchase and sale by the plaintiffs of copyrighted books on the ground that the defendants were acting under an agreement in violation of the laws of New York and the Sherman law. It was established by evidence that the defendant association was composed of about 75 per cent of the pub-

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[1] 147 Fed., 927 (C. C., 1906).

[2] But see Dueber Watch Case Manufacturing Co. *v.* Howard Watch Co., 66 Fed., 637, decided by the circuit court of appeals for the second circuit in 1895. In that case the plaintiff sued a number of competitors for treble damages under sec. 7 of the Sherman law. The complaint alleged in substance that the defendants had agreed to maintain arbitrary and fixed prices for their watchcases, and that for the purpose of compelling the plaintiff to join with them therein had further agreed not to sell any goods to any dealer who dealt with the plaintiff. A majority of the court held that a demurrer to the complaint had been rightly sustained below, but even the majority could not agree as to the ground on which the decision should be based. Lacombe, J., held that the agreement was not in violation of the Sherman law. Shipman, J., although agreeing with the action of the lower court, refused to adopt the reasoning of Lacombe, J., and expressly stated that he decided the case on the more technical ground that the complaint failed to show that interstate commerce was involved. Wallace, J., on the other hand, dissented, holding that the agreement complained of was an illegal restraint of interstate commerce within the meaning of the Sherman law. In commenting on this decision in United States *v.* Addyston Pipe & Steel Co., 85 Fed., 271 (C. C. A., sixth circuit, 1898), Taft, J., said with reference to the three opinions expressed therein (p. 300): "These varying views decided the case, but they certainly furnish no precedent or authority." See also Dueber Watch Case Manufacturing Co. *v.* E. Howard Watch & Clock Co. et al., 24 N. Y. S., 647 (Sup. Ct., 1893).

[3] 231 U. S., 222 (1913).

lishers of copyrighted books in the United States, and that its members had agreed to sell such books only to those who maintained certain retail prices fixed thereon by the association; that whenever these prices were cut by retailers the association would issue cut-off lists, so called, directing the discontinuance of the sale of books to offenders, and that the plaintiffs who had failed to maintain the fixed prices had been put upon the cut-off lists and were unable to secure a supply of copyrighted books in the ordinary course of business. On these facts the Court of Appeals of New York held,[1] following its previous decision in Straus *v.* American Publishers' Association,[2] that the plaintiffs had no cause of action because the books involved were copyrighted. This decision was reversed by the Supreme Court of the United States on the ground that the agreement of the defendants transcended what was necessary for the proper protection of the copyright monopoly, applying the doctrine announced in Standard Sanitary Manufacturing Co. *v.* United States[3] with reference to patented articles.

In United States *v.* The Eastern States Retail Lumber Dealers' Association and others[4] it appeared that the defendants distributed information in a certain document known as the "Official Report," the form of which was as follows:

OFFICIAL REPORT.

[Name of the particular association circulating it.]

STATEMENT TO MEMBERS (WITH THE DATE).

You are reminded that it is because you are members of our Association and have an interest in common with your fellow members in the information contained in this statement, that they communicate it to you; and that they communicate it to you in strictest confidence and with the understanding that you are to receive it and treat it in the same way.

The following are reported as having solicited, quoted or as having sold direct to the consumers:

(Here follows a list of the names and addresses of various wholesale dealers.)

Members upon learning of any instance of persons soliciting, quoting, or selling direct to consumers, should at once report same, and in so doing should, if possible, supply the following information:

The number and initials of car.

The name of consumer to whom the car is consigned.

The initials or name of shipper.

The date of arrival of car.

The place of delivery.

The point of origin.

The defendants were enjoined from—

* * * combining, conspiring, confederating, or agreeing together or with others jointly to distribute, and from jointly distributing, to any of the members of the

[1] 193 N. Y., 496 (1908).
[2] 177 N. Y., 473 (1904).
[3] 226 U. S., 20 (1912).
[4] 234 U. S., 600, 605, 608, 609, 614 (1914).

aforesaid associations or any other person or persons any information showing soliciting, quotations, or sales and shipments of lumber and lumber products from manufacturers and wholesale dealers to consumers of or dealers in lumber, and from the preparing and distributing the said list known as the "Official Report," heretofore described, or by the use of any similar device.

In considering this case on appeal, the Supreme Court, by Mr. Justice Day, said in part:

* * * These lists were quite commonly spoken of as blacklists, and when the attention of a retailer was brought to the name of a wholesaler who had acted in this wise it was with the evident purpose that he should know of such conduct and act accordingly. True it is that there is no agreement among the retailers to refrain from dealing with listed wholesalers, nor is there any penalty annexed for the failure so to do, but he is blind indeed who does not see the purpose in the predetermined and periodical circulation of this report to put the ban upon wholesale dealers whose names appear in the list of unfair dealers trying by methods obnoxious to the retail dealers to supply the trade which they regard as their own.

* * * * * * *

A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade.[1] "But," as was said by Mr. Justice Lurton, speaking for the court in Grenada Lumber Co. *v.* Mississippi,[2] "when the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed."

When the retailer goes beyond his personal right, and, conspiring and combining with others of like purpose, seeks to obstruct the free course of interstate trade and commerce and to unduly suppress competition by placing obnoxious wholesale dealers under the coercive influence of a condemnatory report circulated among others, actual or possible customers of the offenders, he exceeds his lawful rights, and such action brings him and those acting with him within the condemnation of the act of Congress, and the District Court was right in so holding. It follows that its decree must be affirmed.[3]

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[1] In like manner it has been held that the Sherman law does not prevent a single wholesaler from refusing to deal with another wholesaler. Locker *v.* American Tobacco Co., 218 Fed., 447 (C. C. A., Second Circuit, 1914). The court there said: We can think of no reason based on the common law or the Sherman law which required the introduction of a second jobber or wholesaler between the producer and the consumer. In short, we are convinced that what was done by these defendants was not prohibited by law, but was a reasonable common sense trade arrangement adopted by the exigencies of the situation. See also Locker *v.* American Tobacco Co., 195 N. Y., 565 (1908).

[2] 217 U. S., 433, 440.

[3] In Lawlor *v.* Loewe, 235 U. S., 522, 534 (1915), Mr. Justice Holmes, referring to Eastern States Retail Lumber Dealers' Association *v.* U. S., said: "Whatever may be the law otherwise, that case establishes that, irrespective of compulsion or even agreement to observe its intimation, the circulation of a list of 'unfair dealers,' manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers combined with a view to joint action and in anticipation of such reports, is within the prohibitions of the Sherman Act if it is intended to restrain and restrains commerce among the States."

METHODS OF COMPETITION PROHIBITED BY DECREES UNDER THE SHERMAN LAW.

Section 13. General statement.

A number of specific competitive methods have been prohibited in decrees entered under the Sherman law, and in some instances the courts have in terms denounced them as unfair. These decrees have been entered in two classes of cases (1) where the suits have been contested, and (2) where, before final hearing, the parties have agreed on the terms of the decree.

Where the courts have held that the defendants have violated the law and the terms of the injunction have been contested by counsel, the practices prohibited are presumably within the condemnation of the statute, at least when considered in connection with the surrounding facts and circumstances. This is particularly true where cases have been appealed and the terms of the decrees have been approved by the higher courts.

By far the greater number of prohibitions of unfair competitive methods, however, are found in "consent decrees." The usual procedure in such cases has been for the Government to file a bill setting forth the organization of the offending combination, association, or other defendant, the violation of law complained of, and the competitive methods employed by the defendants. The latter coming into court have admitted a technical violation of the act and have agreed to the terms of a decree satisfactory to the Department of Justice. Under these circumstances it is possible that the courts have not scrutinized the injunctions with the same degree of care exercised in cases where the terms of the decree have been objected to by the defendants, and while such decrees are binding on the parties, it is open to question whether all the competitive methods prohibited are in themselves violations of the Sherman law. Moreover, in practically every decree a number of competitive practices have been forbidden and it can not therefore be determined whether, taken separately, any one of them would have been prohibited. Furthermore, the use of the competitive methods in a given case should be considered in the light of surrounding circumstances, such as the character of the defendant, whether a corporate or other form of combination, the percentage of the industry controlled by it, and other related facts. But while the legality of particular competitive methods probably can not be determined from these decrees, they show at least that the methods prohibited are unfair in the opinion of the officials charged with the administration of the anti-trust act, and, inferentially, also in the opinion of the courts signing the decrees. Moreover, where, as sometimes occurs, a particular practice has been prohibited in a number of decrees and under vary-

ing circumstances additional weight is given to the conclusion that the practice is of itself unlawful.

The important competitive methods that have been prohibited are set out below.

Section 14. Price Cutting.

IN GENERAL.—The defendants in United States *v.* Central-West Publishing Co. et al. were enjoined[1] from underselling any competing service and from selling any part of their service at less than a fair and reasonable price, or at less than a fair and reasonable profit, or at cost, or less than cost, with the purpose or intent of injuring or destroying the business of any competitor.

In February, 1915, the Great Lakes Towing Co. and others were enjoined from, among other things, "engaging in so-called 'rate wars,' or making competitive cuts from its regular schedule of tariff rates, relating to any kind of services furnished by the towing company, except that to meet (but only to meet, and not to go below,) actual rates made by the competitor or competitors for the same kind and quality of service, the towing company may cut not exceeding 25 per cent from its regular tariff rates"; and it was provided further, "that such cut shall not reduce the rate below the actual cost of such service, nor shall it be made in any case under circumstances constituting in fact unfair or fraudulent competition."

BONUSES.—The American Thread Co. and the other defendants in that case were enjoined[1] "from offering in the United States a bonus or gift in the form of free goods of any kind as an inducement to any class of customers to purchase defendants' threads, except that the defendants or any of them may in good faith give or offer to give or distribute samples in reasonable quantities in order to introduce their threads and establish new trade, and except that they may offer and give free samples to actual purchasers for bona fide distribution among consumers: provided, however, that such samples to purchasers shall not exceed 5 per cent of their purchases at any one time."

Section 15. Price discriminations.

IN GENERAL.—The General Electric Co., and the other defendants in that case, were enjoined[1] "from maintaining, by agreement, differentials between lamps which do not in fact differ in quality or efficiency."

BETWEEN LOCALITIES (LOCAL PRICE CUTTING).—In a suit against the American Thread Co. and others engaged in the manufacture and sale of thread, the defendants were restrained[1] from selling or offer-

[1] Consent decree.

ing thread below the cost of production, or at prices which, after allowing for differences in cost of transportation, grade, quality, or quantity sold, were lower than the prices charged in other parts of the United States, with the intent of thereby obtaining a monopoly or destroying or injuring the trade or business of another or preventing another from engaging in the thread business.

BETWEEN A COMPETITOR'S CUSTOMERS AND ITS OWN CUSTOMERS.—The defendants in United States *v.* Central-West Publishing Co. et al. were enjoined[1] from sending out traveling men to influence the customers of competitors so as to secure their trade without regard to price.

The American Coal Products Co., the Barrett Manufacturing Co., and others were prohibited[1] from selling coal tar, oil tar, and roofing material at a less price to customers of competitors than they sold them to their own customers when such reduced prices were made with the intention of driving the competitor out of business in any particular section of the United States.

The General Electric Co. and others were enjoined[1] from "offering or making more favorable prices or terms of sale for incandescent electric lamps to the customers of any rival manufacturer or manufacturers than it at the same time offers or makes to its established trade, where the purpose is to drive out of business such rival manufacturer or manufacturers, or otherwise unlawfully to restrain the trade and commerce of the United States in incandescent electric lamps;" but no defendant was enjoined from "making any prices for incandescent electric lamps to meet, or to compete with, prices previously made by any other defendant, or by any rival manufacturer;" and nothing in the decree was to be taken in any respect to enjoin or restrain "fair, free and open competition."

In United States *v.* E. I. duPont de Nemours & Co. et al., certain defendants were enjoined from offering more favorable prices or terms of sale for the products manufactured by them to the customers of any rival than they at the same time offer to their established trade, "where the purpose is to unfairly cripple or drive out of business such rival" or otherwise unlawfully to restrain trade, but it was provided that no defendant should be restrained from making any price to meet or to compete with the prices made by any other defendant, or by any rival, and that nothing in the decree should be taken in any respect to enjoin or restrain "fair, free and open competition."

The American Thread Co. and the other defendants in that case were enjoined[1] "from offering or giving secret rebates or other secret inducements to any customer of a competitor in the United States."

[1] Consent decree.

BETWEEN STOCKHOLDERS AND NONSTOCKHOLDERS.—The Great Lakes Towing Co. and others were enjoined from, among other things, giving to any customer any rate, concession, discount or rebate, except such as are given equally and without discrimination to all customers for the like service, regardless of whether or not such customers are stockholders in the towing company.

BETWEEN COMPETITORS AND NONCOMPETITORS.—The Aluminum Co. of America was enjoined[1] from charging higher prices for crude and semifinished products to manufacturers competing with its subsidiaries than it charged under like conditions to such subsidiaries.

BETWEEN CUSTOMERS WHO PURCHASE A SPECIFIED QUANTITY OF GOODS AND THOSE WHO DO NOT.—The American Thread Co. and the other defendants in that case were enjoined[1] from giving or offering to wholesale or retail dealers, jobbers, or consumers of sewing thread, any bonus, rebate or other inducement depending upon the aggregate amount of future purchases to be made by them, or from cooperating with and assisting such dealers to pool their orders to enable them to obtain the benefit of any discount or other concession allowed on a specified quantity of goods; and from offering or giving secret rebates or other inducements to the customers of competitors; and from offering a bonus or free goods as an inducement to any class of customers to purchase their threads.

The Great Lakes Towing Co. and others were enjoined from, among other things, giving to any customer any rate, concession, discount or rebate, except such as are given equally and without discrimination to all customers for the like service, regardless of the amount or proportion of their custom furnished to the towing company.

Section 16. Bogus Independents.

The Central-West Publishing Co. and two corporations controlled by it were enjoined[1] "from maintaining any auxiliary plant in any cities of the United States apparently independent, but in fact the property of the Western Newspaper Union,[2] or its officers and stockholders, for the purpose and with the intent of making the newspaper trade generally believe such institutions to be independent." The American Press Association was enjoined from doing similar acts.

In United States *v.* E. I. duPont de Nemours & Co. et al., certain corporate defendants were each enjoined from doing business under any other than its own corporate name or the name of a subsidiary and it was provided that in case of a subsidiary corporation, the controlling corporation should cause the products of such subsidiary

[1] Consent decree. [2] Controlled by the Central-West Publishing Co.

which are sold in the United States and bear the name of the manufacturer to bear also a statement indicating the fact of such control.

The General Electric Co. was enjoined[1] from conducting, except in its own name, the business carried on by it in incandescent lamps, and it was further decreed that "all factories, plants, and manufacturing and selling departments operated or owned by said General Electric Co., for the manufacture and sale of incandescent lamps, shall be made known to the general public and trade as the property and business of the said General Electric Co.; provided that the General Electric Co. is not prohibited by this decree from preserving and using the trade names of incandescent lamps lawfully manufactured or sold by it, including the trade names now employed" by certain companies mentioned "if it acquires such trade names and the business of manufacturing lamps to which the same are applied; but such names shall be publicly known as the property of the General Electric Co."

In United States *v.* American Tobacco Co. et al. the defendants were enjoined from "doing business directly or indirectly under any other than its own corporate name or the name of a subsidiary corporation controlled by it; *Provided, however*, That in case of a subsidiary corporation the controlling corporation shall cause the products of such subsidiary corporation, which are sold in the United States and bear the name of the manufacturer, to bear also a statement indicating the fact of such control."[2]

In United States *v.* American Coal Products Co. et al. the use of the name of any one-time independent company or any company acquired by the Barrett Manufacturing Co. or the Coal Products Co. was enjoined[1] and prohibited on the part of defendant companies or defendant individuals, except as departments of the Barrett Manufacturing Co. and except for the use of any registered trademark which was to be permitted; and such ownership by departments was required to be made public by printing the same on letterheads, billheads, and in advertising.

Section 17. "Fighting ships," "fighting brands," and "flying squadrons."

FIGHTING SHIPS.—It has been a common practice of combinations or conferences of steamship lines to maintain what are termed "fighting ships."[3] These vessels are employed to meet and destroy the competition of other lines, particularly that of lines just enter-

[1] Consent decree.

[2] United States *v.* American Tobacco Co. et al., 191 Fed., 371, 429 (C. C., 1911). See also Report of the Commissioner of Corporations on the Tobacco Industry, Pt. I, pp. 110–111.

[3] Investigation of shipping combinations under H. R. 587, by House Committee on the Merchant Marine and Fisheries, 62d Cong., 2d sess.; Hearings, Vol. II, pp. 1252–1254, 1257; Vol. III, pp. 53–54, 131.

ing the field. On occasions when some outside company or shipowner has put a vessel on a berth near a vessel belonging to one of the conference lines and offered to carry at cheaper rates, a fighting ship has been dispatched to offer the same or a lower rate. When not engaged in thus waging war on a competitor the vessels can be employed on regular charters. In the case of United States *v.* Hamburg-American Steamship Line et al.[1] the practice of the members of a steamship conference contributing to the maintenance of fighting ships to be used as required by the various lines was condemned. The injunction in this case restrained the defendants from—

> combining, conspiring or agreeing to interfere with or restrain the business of any owner of a vessel operated in competition with the vessel or vessels of one or the other of said defendants, by providing, operating, or maintaining an extra vessel for the purpose of having it compete with such competing vessel by offering to carry passengers; * * *.

While the court in this case enjoined the defendants from combining or agreeing to maintain or operate and from contributing to the expense of a fighting ship, the following clause in the injunction apparently leaves any one of the companies composing the combination free to employ this method of competition if not done in combination with any of the other lines:

> This injunction, however, shall not in any way affect the right of each individual defendant to run such vessels and on such terms as such individual defendant may choose in opposition to any competitor provided that the cost and expense thereof is not contributed in whole or in part by any of the other defendants.[2]

In a subsequent case[3] the conference agreement attacked by the Government provided for fighting ships, and the court remarked in dismissing the bill that if there were evidence that steps had been taken to put such a ship on they would be inclined to grant an injunction similar to the one in the Hamburg-American case.

"FIGHTING BRANDS."—It has been the practice of some manufacturers to offer certain brands of goods at special prices in competitive territory. The sale of these goods at particularly attractive prices relieves the manufacturer of the necessity of cutting prices on established brands while at the same time giving the dealer practically as good an article at a price which will take the business from competitors. Goods used for this purpose have been termed "fighting brands" and were defined in United States *v.* American Thread Co. et al.[4] to be "brands which are devised or revived and used for the purpose of being offered principally to customers of competitors at

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[1] 216 Fed., 971 (D. C., 1914).

[2] Cf. Lough *v.* Outerbridge, p. 455, and Mogul Steamship Co. *v.* McGregor, Gow & Co., p. 404.

[3] United States *v.* American-Asiatic Steamship Co. et al., 220 Fed., 235, 236 (D. C., 1915).

[4] Consent decree.

cut prices, that is to say, at prices lower, or on terms more favorable, than the price or terms asked by the seller for substantially the same thread under different brands or trade names." As thus defined, their use was prohibited by the decree in the thread case.

"FLYING SQUADRONS."—Special selling forces, sometimes termed "flying squadrons," have been generally used to push these fighting brands. In the thread case it was alleged that where an independent jobber refused to deal with the defendants these salesmen would canvass his trade and offer the orders obtained to the jobber as an inducement to deal with the defendants. This failing, the orders would be offered to competing jobbers until some one accepted them, or in the event that no jobber accepted them they were filled direct by the defendant thread manufacturers. The use of flying squadrons was prohibited in the thread decree,[1] as was the special canvassing of any dealer or jobber in the manner described above.

Section 18. Exclusive dealing.

CONTRACTS FOR EXCLUSIVE DEALING.—In United States *v.* Standard Sanitary Manufacturing Co. the court found that among the means adopted by the defendants to carry out the purposes of an unlawful combination were certain jobbers' license agreements which were required to be executed by the purchaser in order to obtain licensed sanitary enameled ironware. Among other things, the purchaser under such contracts agreed "not to purchase, sell, advertise or solicit orders for, or in any way handle or deal in sanitary enameled ironware of any manufacturer not licensed under the letters patent" enumerated in the agreement except with the express written permission of the licensor. The defendants were enjoined and prohibited from doing anything in furtherance of said agreements and from enforcing any of the terms thereof.[2]

The American Thread Co. and others were enjoined[1] "from soliciting or exacting from wholesale or retail dealers or jobbers or from customers of competitors in the United States any agreement not to handle or to cease handling the brands of competitors."

The Great Lakes Towing Co. and certain corporations controlled by it were restrained from "entering into any agreement, contract or understanding, direct or indirect, with any customer, new or old, for the exclusive furnishing of the whole or any part of the towing or any other service of such customer, except the single item of service then immediately to be performed, and either as respects more than one port or place or as respects but one port or place, to the end that the ultimate rate to each customer shall be absolutely the same for each like, contemporaneous item of service."

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[1] Consent decree.

[2] Standard Sanitary Manufacturing Co. *v.* United States, 226 U. S., 20, 46 (1912).

In a petition filed by the Government it was alleged that the General Electric Co. and National Electric Lamp Co. controlled all patents covering tantalum filament and tungsten filament lamps and caused dealers to enter into contracts with them and their controlled companies wherein it was agreed that these companies would sell tantalum filament and tungsten filament lamps to such dealers if the latter would purchase from such companies all of the carbon filament lamps required by them; and that inasmuch as the dealers were compelled, in order to meet the demands of their trade, to have all three types of lamps, the necessary result of these contracts was to compel the dealers to buy carbon filament lamps only from the defendants, with the further result of making it practically impossible for any outside company to successfully engage in the manufacture and sale of the carbon filament lamp. In this case the General Electric Co. and other lamp-manufacturing defendants were enjoined[1] from "enforcing any contracts, arrangements, agreements or requirements with dealers, jobbers and consumers, who buy from the said defendants either tantalum filament, tungsten filament, metalized carbon filament or ordinary carbon filament lamps, or any of them, by which such dealers, jobbers and consumers are compelled to purchase all their ordinary carbon filament lamps from said defendants as a condition to obtaining such other types of lamps, or any of them, or by which dealers, jobbers and consumers are compelled to purchase any one or more of the above-mentioned types of lamps from the said defendants as a condition to the purchase or supply of any other or all of said types of lamps"; and they were further enjoined from "discriminating against any dealer, jobber or consumer desiring to purchase tantalum, tungsten or metalized carbon filament lamps because of the fact that such dealer, jobber or consumer purchases ordinary carbon filament lamps from others," and from "discriminating against any dealer, jobber or consumer desiring to purchase any one or more of the above-mentioned types of lamps because of the fact that such dealer, jobber or consumer purchases any other of said lamps from other manufacturers or dealers."

REFUSAL TO DEAL SAVE ON EXCLUSIVE TERMS.—The American Thread Co. and others were enjoined[1] from, among other things, "refusing to deal with, or discriminating against, or threatening to refuse to deal with or to discriminate against those who handle the goods of competitors."

The Central-West Publishing Co. and two other corporations controlled by it were enjoined[1] from causing or permitting their agents or salesmen to intimate or convey the impression that unless publishers approached by such salesmen dealt with these companies they

[1] Consent decree.

would be discriminated against as soon as the American Press Association, a competitor, should be put out of business by the competition to which it was being subjected.

The Great Lakes Towing Co. and others were enjoined from, among other things, "refusing or neglecting to furnish service as speedily as practicable to any applicant therefor, except where refusal to render service to such applicant is justified by a good-faith belief, communicated to the customer, that payment for such service will not promptly be made."

In another suit the Government alleged that the proprietors of the Prince Line, Lamport & Holt Line, and Hamburg-American Line, in furtherance of a combination and conspiracy in violation of the Sherman Act, and in violation of their legal duty as common carriers, sought to coerce shippers and destroy the competition of rivals by refusing altogether to carry the goods of such shippers as refused to confine their shipments to defendants' lines and other lines with whom the defendants were in combination. The court, by Lacombe, J., enjoined this practice, although in all other respects the bill was dismissed.[1]

Section 19. Use of certain articles as a condition of purchase or use of other articles.

UTILIZING A PATENT TO CONTROL THE SALE, ETC., OF UNPATENTED ARTICLES.—The General Electric Co. and the other defendants in that case were enjoined [2] "from utilizing any patents which they may have or claim to have or which they may hereafter acquire or claim to have acquired, as a means of controlling the manufacture or sale of any type or types of lamps not protected by lawful patents."

REQUIRING THE PURCHASE OF CERTAIN UNPATENTED ARTICLES AS A CONDITION OF PURCHASING OTHER UNPATENTED ARTICLES (FULL-LINE FORCING).—The practice of requiring dealers to order additional lines or brands of goods as a condition of obtaining some other line has been described as "full-line forcing." In United States *v.* American Tobacco Co. et al.[3] the defendants were enjoined, among other things, from "refusing to sell to any jobber any brand of any tobacco product manufactured by it, except upon condition that such jobber shall purchase from the vendor some other brand or product also manufactured and sold by it; provided, however, that this prohibition shall not be construed to apply to what are known as 'combination orders,' under which some brand or product may be offered to a jobber or dealer at a reduced price, on condition that he purchase a given quantity of some other brand or product."

[1] United States v. Prince Line (Ltd.) et al., 220 Fed., 230 (D. C., 1915).
[2] Consent decree.
[3] 191 Fed., 371, 429 (C. C., 1911).

Section 20. Inducing breach of competitors' contracts.

The decree in United States *v.* The Burroughs Adding Machine Co. et al.[1] directed the defendants to instruct their agents in writing to "absolutely desist and refrain" from interfering with the business, machines, or appliances of competitors "by inducing or trying to induce such purchasers to cancel their contracts with competitors and to return to such competitors the adding machines or appliances so purchased." The petition in this case alleged that the defendants had instructed their agents and salesmen how to manipulate competitors' machines for the purpose of showing alleged defects therein, and thus dissatisfying customers or prospective customers with competing machines; and also that they had supplied agents with parts or illustrations misrepresenting the mechanism of machines being sold by competitors, for the purpose of deceiving customers or prospective customers of such competitors. These were methods apparently used by the defendants to induce the cancellation of contracts and the return of competitors' machines.

In United States *v.* Central-West Publishing Co., Western Newspaper Union, et al., certain of the defendants engaged in selling stereotyped news and other matter, and the so-called "patent inside" or ready printed matter to country newspapers, were enjoined[1] from offering to protect publishers of such papers against expenses and costs of any suit that might arise from their breaking contracts with others supplying the same class of material and entering into contracts with the defendants. All of the defendants were likewise enjoined from offering bonuses of paper or plate service free or at a nominal price with the intent of inducing or enabling customers of competitors to break their contracts.

Section 21. Espionage by corruption or bribery of employees.

The Burroughs Adding Machine Co. was required[1] to direct its servants and agents to desist from interfering with the business of competitors by wrongfully obtaining information respecting the business, sales, or shipments of such competitors, or "by fraudulent or illegal means inducing the employees of said competitors to give them such information," or by permitting its agents or employees to seek or induce others to seek employment with competitors for the purpose of wrongfully securing information as to the business of said competitors, or by any other similar and unlawful means acquiring such information.

[1] Consent decree.

Section 22. Boycotting and blacklisting by trade associations.

In recent years there has been manifested a tendency toward more direct distribution; that is, for the manufacturer to sell directly to the retailer, the mail-order house, the department store, and, in some instances, even to the consumer. This movement has been opposed by dealers who would be unfavorably affected by such direct selling, and organized opposition has come principally from associations of jobbers, wholesalers, or retailers. Their object has been to maintain the established system of selling, and thus to secure for themselves a profit on all products passing from the manufacturer to the consumer.

The boycott has been the principal means used to further this object. Members of wholesalers' associations have agreed not to patronize manufacturers who sell directly to retailers or consumers, and the members of retail associations have likewise refused to buy from wholesalers who sell to consumers. Various methods have been employed by these associations to advise their members of manufacturers or wholesalers who make direct sales. In some instances lists of such sellers, sometimes termed "black lists," have been circulated among the members, and this has been followed by a boycott of the wholesalers or manufacturers so listed. Reciprocal agreements have also been effected between wholesalers' associations and manufacturers' associations whereby, in consideration of the manufacturers selling only to the wholesalers, the latter have agreed to purchase exclusively from such manufacturers. Retail dealers have entered into similar agreements with wholesalers. To further the execution of these agreements both classes of associations have exchanged lists of their members in order that they might be advised of the concerns with whom they should deal. Such lists are sometimes termed "white lists." In some instances wholesale associations have admitted manufacturers and importers to associate membership, and in such cases the lists of associate members constitute another form of "white list."

A number of such organizations have been attacked under the Sherman law, and the courts have condemned not only certain ends sought to be attained by these associations but have prohibited the use of any means by which these purposes may be achieved. The usual means—the boycott, black list, and white list—have been specifically enjoined.

Unlawful objects.—In a suit by the United States against the Southern Wholesale Grocers' Association the members of the association were enjoined[1] from, among other things, combining, conspiring, confederating, or agreeing, together or with others, expressly

[1] Consent decree.

or impliedly, directly or indirectly (1) to prevent manufacturers or producers from selling commodities to any person who was not a member of the association or who was not listed in the Green Book (white list); (2) to prevent any person, firm, or corporation not a member of the association from purchasing commodities from manufacturers, jobbers, or producers; (3) to do or refrain from doing anything the purpose or effect of which was to hinder or prevent, by intimidation or coercion, any person, firm, or corporation from buying or selling any commodity from and to whomsoever might be agreed upon.

In United States *v.* The National Wholesale Jewelers' Association, the National Association of Manufacturing Jewelers et al., the defendants were enjoined[1] from combining, conspiring, confederating, or agreeing with each other or with others, expressly or impliedly, directly or indirectly (1) to hinder or prevent manufacturers of jewelry or jewelry products from selling the same to any person, firm, or corporation not a jobber or wholesaler of such products or not so classified by the defendant wholesale association or not listed in the rating books of the trade; (2) to hinder and prevent such manufacturers from selling to retail dealers, department stores, mail-order houses, purchasing syndicates, or others desiring to purchase; (3) to hinder or prevent any person, firm, or corporation from buying jewelry directly from manufacturers; (4) to hinder or prevent any person, firm, corporation, or other organization from buying or selling jewelry from or to whomsoever he, they, or it may desire; (5) to favor with their custom and patronage only those manufacturers who agreed, or whose avowed policy it was, to sell through the wholesaler or jobber and not directly to retailers, mail-order concerns, department stores, or purchasing syndicates; (6) to intimidate or coerce manufacturers or producers of jewelry into selling only to persons, firms, etc., approved by the wholesale association; (7) to do or refrain from doing anything the purpose or effect of which would be to hinder or prevent, by intimidation, coercion, or withdrawal, or threatened withdrawal, of patronage, any person, firm, etc., from buying or selling jewelry wherever, whenever, and from or to whomsoever might be agreed upon by the seller or purchaser.

In United States *v.* Pacific Coast Plumbing Supply Association et al. the defendants were enjoined[1] from combining, conspiring, confederating, or agreeing together, or with others, expressly or impliedly, directly or indirectly, to prevent manufacturers of plumbing supplies from selling such supplies to any person not a member of the defendant supply association or whose name did not appear on the list of dealers published by the defendant association.

[1] Consent decree.

In United States *v.* Philadelphia Jobbing Confectioners' Association et al., the defendants were enjoined,[1] among other things, "from combining, conspiring, confederating, agreeing or contracting together, or with one another, or with others, orally or in writing, expressly or impliedly, directly or indirectly, with a view to preventing manufacturers or producers, or their agents, engaged in shipping and selling such commodities among the several States, from shipping and selling such commodities freely in the open market" and "from sending to manufacturers or producers, or their agents, engaged in selling or shipping said commodities among the several States, communications, oral or written, suggesting directly or indirectly that such manufacturers or producers, or their agents, shall refrain from selling such commodities directly to the consuming or retail trade, or to jobbers not members of said association."

BOYCOTTS.—In United States *v.* National Wholesale Jewelers' Association et al. the defendants were enjoined[1] "from combining, conspiring, confederating, or agreeing with each other or with others, expressly or impliedly, directly or indirectly to boycott or threaten with loss of custom or patronage any manufacturer engaged in interstate or foreign commerce in jewelry or jewelry products for having sold, or being about to sell jewelry or jewelry products to retail dealers, department stores, mail-order houses, purchasing syndicates, or to any other person, firm, or corporation not engaged in the wholesale or jobbing jewelry business."

Boycotts have also been specifically prohibited in United States *v.* Pacific Coast Plumbing Supply Association et al.,[1] United States *v.* Southern Wholesale Grocers' Association et al.,[1] and United States *v.* Philadelphia Jobbing Confectioners' Association et al.[1]

BLACK LISTS.—In United States *v.* The Eastern States Retail Lumber Dealers' Association and others[2] the defendants were enjoined from "combining, conspiring, confederating, or agreeing together or with others jointly to distribute, and from jointly distributing, to any of the members of the aforesaid associations or any other person or persons any information showing soliciting, quotations, or sales and shipments of lumber and lumber products from manufacturers and wholesale dealers to consumers of or dealers in lumber" and from the preparation and distribution of lists known as the "Official Report," heretofore described,[3] or by the use of any similar device.

The defendants in United States *v.* National Wholesale Jewelers' Association, National Association of Manufacturing Jewelers and others, were enjoined,[1] among other things, from "publishing or distributing, or causing to be published or distributed, or aiding or assisting in the publication or distribution of * * * the names of any manufacturers of jewelry or jewelry products who have been

[1] Consent decree. [2] 234 U. S., 600 (1914). [3] See p. 476.

or are selling or shipping jewelry or jewelry products to any person, firm, corporation, or other organization not classified or recognized by the said National Wholesale Jewelers' Association as legitimate wholesalers or jobbers" or not listed in certain rating books as wholesalers or jobbers, "or the names of any manufacturers from whom any such person, firm, corporation, or other organization has been, is, or is supposed to be receiving jewelry or jewelry products."

The defendants in United States *v.* Pacific Coast Plumbing Supply Association et al. were enjoined,[1] among other things, from circulating, causing to be circulated, or aiding in the circulation of "the name of any manufacturer of plumbing supplies who is or may be selling and shipping plumbing supplies to persons, firms, or corporations who are not members of the said Pacific Coast Plumbing Supply Association," or who are not listed in the so-called Blue Book published by one of the defendants, or any book, pamphlet, or list of like character.

The defendants in United States *v.* The American Thread Co. et al. were enjoined[1] "from soliciting, making, ratifying, or confirming, by agreement or understanding of any kind or nature with any other corporation, copartnership, or person, any lists of wholesale or retail dealers or jobbers in the United States with whom trade in sewing thread shall not be carried on."

The defendants in United States *v.* The New Departure Manufacturing Co. et al. were enjoined,[1] among other things, from "selecting, making up, ratifying or confirming by combination, conspiracy, mutual agreement or understanding by and between any of said parties, any lists of manufacturers or jobbers or dealers with whom trade shall or shall not be carried on * * * ."

WHITE LISTS—LISTS OF APPROVED MANUFACTURERS AND DEALERS.—The Southern Wholesale Grocers' Association and its members were enjoined,[1] among other things, from publishing or encouraging the publication or distribution of any list of wholesale grocers located in the territory embraced by said organization who had announced their intention or agreed, directly or indirectly, expressly or impliedly, to work in harmony with said association. They were also enjoined from publishing or encouraging the publication or distribution of lists of manufacturers or producers who had expressly or impliedly, directly or indirectly, agreed to sell only to members of said association, or to persons or firms listed in the so-called Green Book, entitled "Official List of Wholesale Grocers in the States of Alabama, Arkansas, District of Columbia, Florida, Georgia, Indian Territory, Louisiana, Maryland, Mississippi, North Carolina, Okla-

[1] Consent decree.

homa, South Carolina, Tennessee, Texas, and Virginia," or any list of like character.[1] In a contempt proceeding subsequently brought for violating this decree, the Government having conceded that it would not ask punishment for any act which did not violate both the decree and the Sherman law, it was held that members of the association who continued to send to manufacturers lists of dealers who had announced their intention or agreed, directly or indirectly, expressly or impliedly, to work in harmony with the association, were guilty of contempt.[2]

Section 23. Defamation of competitors and disparagement of competitors' goods.

The Central-West Publishing Co., and certain corporations controlled by it, were enjoined[3] from causing or permitting their agents or salesmen to circulate reports or to intimate that these companies would put the American Press Association out of business, or that the latter would not be able to continue in business against the competition of such companies, or that the American Press Association intended to combine with them. They were further enjoined from unfairly criticizing and abusing the method of the American Press Association with reference to advertising, from misrepresenting the business and business methods of the American Press Association, with the intent and for the purpose of taking away its customers or otherwise injuring its business, and from continuing or participating in unfair attacks upon the said press association, with the purpose of injuring or depreciating or destroying the value of its property and securities.

The American Press Association was likewise enjoined from doing some acts of a similar nature for the purpose of taking away the customers of the Western Newspaper Union (controlled by the Central-West Publishing Co.) or destroying the value of its property and securities.

All the companies above referred to were enjoined from committing any acts of "unfair competition," and particularly from doing, among other things, the acts above referred to.

The American Thread Co. and others have likewise been enjoined[3] "from attacking the credit or business reputation of or the quality of thread dealt in by any competitor in the United States, by means

[1] Substantially similar injunctions have been issued in the following cases: United States v. National Wholesale Jewelers' Association, National Association of Manufacturing Jewelers et al.; United States v. Pacific Coast Plumbing Supply Association et al.; United States v. New Departure Manufacturing Co. et al.; United States v. Philadelphia Jobbing Confectioners' Association et al.; and United States v. National Association of Retail Druggists, et al.

[2] United States v. Southern Wholesale Grocers' Association, 207 Fed., 434 (D. C., 1913).

[3] Consent decree.

of any report known to be false or which there is no reasonable ground to believe."

Section 24. Preventing competitors from obtaining raw material or machinery.

The Government alleged that the Aluminum Co. of America owned from 80 to 90 per cent of the raw material in the United States which entered into a crude product, and controlled by contract the disposition of the remainder; and by contract with foreign companies prevented the importation of such raw material, and that the said company through subsidiaries controlled from 50 to 70 per cent of the manufacture of finished products from this raw material. This company was restrained[1] from:

1. Delaying shipments of raw material to any manufacturer competing with its own subsidiaries in the manufacture and sale of finished products, without reasonable notice and cause.

2. Refusing to ship or to continue shipments of such material to a competing manufacturer upon contracts or orders, and particularly on partially-filled orders.

3. Delaying bills of lading on such shipments.

4. Furnishing known defective material to such competitors.

5. Charging higher prices for crude or semifinished products to manufacturers competing with its subsidiaries than it charged under like conditions to such subsidiaries.

6. Refusing to sell crude or semifinished products to prospective competitors on like terms and conditions of sale as it sold to its subsidiaries.

7. From demanding, as a condition precedent to selling such material to a competitor, that it should divulge the terms which the competitor would make to secure the work in connection with which the material would be used and from giving this information to its subsidiaries or others.

8. Requiring competitors not to compete in certain lines with the company or its subsidiaries as a condition of securing material.

9. Representing that unless companies dealt with it or its subsidiaries they would be unable to secure a sufficient supply of the material, or at a price that would enable them to compete with it; or that their supply would be cut off entirely.

10. Preventing the expansion of the business of other manufacturers by threatening to cut off their supply of raw material if they attempted to enlarge their business.

11. Raising the price of crude or semifinished products to its subsidiaries in order to raise it to competing manufacturers.

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[1] Consent decree.

In United States *v.* General Electric Co. et al., the Government alleged, among other things, that the defendants either prevented or hindered the manufacturers of raw material and machinery employed in the manufacture of lamps from selling to competitive companies with the purpose and result of driving them out of business, or forcing them to sell out to the defendants or to join the combination. The General Electric Co. and the lamp-manufacturing defendants were enjoined [1] from "making or carrying out directly or indirectly, any contracts with any manufacturer or manufacturers of lamp-making machinery, or with any manufacturer or manufacturers of bulbs and tubing for incandescent lamps, whereby such manufacturers, or any of them shall be bound not to sell the goods, manufactured by them, respectively, to others than the said defendants or any of them, or hindered from so doing or obligated to sell to the said defendants or any of them, at other and different prices and terms of payment than those to which they severally may sell to other purchasers."

Section 25. Coercion, threats, and intimidation.

THREATS TO ESTABLISH COMPETING PLANTS.—In United States *v.* Central-West Publishing Co. et al., the defendants were enjoined [1] from threatening competitors of either of them that they must cease competing or sell out to one or the other of them, and from threatening that unless they did their industries would be destroyed by the establishment of near-by plants to actively compete with them, "or by any other method of unfair competition." The above-named companies were also enjoined from threatening any customer of a competitor with starting a competing plant unless he patronized one or the other of the defendants.[2]

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[1] Consent decree.

[2] Cf. Petition in United States *v.* Corn Products Refining Co., in which it was alleged that the defendant "informed the various candy manufacturers throughout the country that it expected them to purchase a certain very large percentage of the glucose needed by them from the Corn Products Refining Company; that if said company did not get a sufficient percentage of such glucose business, it would go into the candy manufacture itself in competition with such manufacturers," and that pursuant to this threat it acquired control of the Novelty Candy & Chocolate Co. for the purpose (among others) of retaliation against those manufacturing confectioners purchasing starch and glucose from independent manufacturers.

And see Rice *v.* Standard Oil Co., 134 Fed., 464, 469 (C. C., 1905), where it was alleged, among other things, that the defendant and its associates operated "retail stores for the sale of groceries, oil, and other commodities in localities where retailers banded together and agreed to purchase and did purchase oil of the plaintiff, for the purpose of injuring such retailers and customers of the plaintiff by destroying their grocery or other business so long as they should buy oil of the plaintiff," and that they also sold groceries and merchandise "to the customers of the plaintiff's customers at such ruinous prices as to threaten ruin and loss to the plaintiff's customers." The court sustained a motion to dismiss the declaration on the ground that the averments were too vague, and observed that the plaintiff failed to name any of his customers who were thus affected. See also Standard Oil Co. *v.* Doyle, p. 459.

THREATS TO SUE FOR INFRINGEMENT OF PATENTS.—The New Departure Manufacturing Co. and other corporations engaged in the manufacture and sale of bicycle accessories and parts, particularly coaster brakes, formed a combination to fix prices and for other purposes, the scheme being built around a system of licensing the sale and use of articles in the construction of which a basic patent was professedly necessary. On the dissolution of this combination at the suit of the Government these corporations were enjoined[1] from warning, harassing, or intimidating by means of personal acts, letters or advertisements any corporations or persons in relation to the sale, shipment, and trade in bicycle accessories and parts. By reference to the petition in this case it appears that the intimidation consisted of threats to sue jobbers and dealers for infringement in case they dealt in any coaster brake other than that of the members of the combination.

Section 26. Miscellaneous.

RETENTION OF COMPETITOR'S PROPERTY.—The Central-West Publishing Co., the Western Newspaper Union, and the Western Newspaper Union of New York were enjoined[1] "from in any manner retaining or permitting the retention by their agents or employees of plate metal or other property belonging to the American Press Association, or other competitor," and the American Press Association was likewise prohibited from retaining property belonging to the Western Newspaper Union.[2]

PURCHASE OF STOCK FOR THE PURPOSE OF HARASSING A COMPETITOR.—The Western Newspaper Union, the Western Newspaper Union of New York, the Central-West Publishing Co., and certain individuals were enjoined[1] from causing any person or company to purchase stock or become interested in the American Press Association, a competitor, for the purpose or with the effect of harassing said association by unconscionable or unreasonable demands for an examination of its books or inquiry into its business methods, or the institution of suits with such or like purpose in view.[3]

FEDERAL TRADE COMMISSION ACT AND OTHER ACTS RELATING TO METHODS OF COMPETITION.

Section 27. Federal Trade Commission Act.

In section 5 of the Federal Trade Commission Act, approved September 26, 1914, unfair methods of competition in commerce are declared unlawful and the Commission is empowered to prohibit the

[1] Consent decree.
[2] Cf. Warren Mills v. New Orleans Seed Co., p. 408.
[3] Cf. Funck v. Farmers' Elevator Co. of Gowrie et al., p. 400; and Forrest v. Ry. Co., p. 461.

use of such methods. The language of this section has been quoted in full on page 130. The substantive law of the section is as follows:

SEC. 5. That unfair methods of competition[1] in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the acts to regulate commerce, from using unfair methods of competition in commerce.

Authority is given the commission to proceed under this law if in its opinion such action is in the public interest.

Section 28. Clayton Antitrust Act.

Sections 2 and 3 of the Clayton Act, approved October 15, 1914, prohibit certain practices to lessen competition with respect to price discrimination and exclusive contracts. The language of these two sections is as follows:

SEC. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

SEC. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether pat-

[1] In United States v. Keystone Watch Case Co. et al., 218 Fed., 502, 518 (D. C., 1915), McPherson, Circuit Judge, said in part: "Whatever makes it more difficult for such persons to carry on their business restrains them, and restrains their trade; but (to speak generally) as every successful effort of a merchant to increase his own trade makes it harder for his rivals to succeed, and therefore restrains their trade, and as Congress certainly did not intend to condemn the proper exercise of business zeal and energy, we must recur to the rule of reason and ask—not merely what is restraint of trade, but what is unreasonable restraint of trade? On this subject we are certainly able to say some things with confidence. Competitors must not be oppressed or coerced; fraudulent or unfair or oppressive rivalry must not be pursued. And if these words are criticized as too general we may reply that such generality is apparently unavoidable, as some recent legislation of Congress testifies, and, moreover, we may safely deny that the words are too vague for satisfactory use; for it must be remembered that the common agreement of moral opinion in the community furnishes an adequate guide to their practical meaning and their practical application. They are not likely to be misapprehended or misapplied."

ented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

By section 11 the Federal Trade Commission is authorized to enforce compliance with sections 2 and 3 of the act.

This legislation is of such recent date that there are as yet few decisions of courts to throw light on its construction or its application to concrete facts.

In Elliott Machine Co. *v.* Center[1] the defendant urged that section 3 of the Clayton Act was not retroactive and could not affect contracts entered into before its enactment. This contention was denied, Sessions, J., saying, in part:

> The statute does not in terms except from its operation any agreements or contracts, past, present or future, and in the absence of such exception, it is to be presumed that Congress intended to prohibit not only the making of future contracts but also the further performance of past contracts of the kind specified. * * * It is now too well settled to admit of controversy that a contract to do a thing, lawful when made, may be avoided by subsequent legislation making it unlawful and that an Act of Congress may lawfully affect rights which had their inception before its passage.[2]

In Sperry & Hutchinson Co. *v.* Fenster et al.[3] it appeared that the plaintiff issued trading stamps to subscribers who agreed to distribute the stamps only to customers, and that the defendants obtained such stamps from subscribers under conditions equivalent to a purchase and gave them to their own customers as an inducement for trading. On an application for a preliminary injunction the defendants contended that the plaintiff's practice of seeking to enjoin and in certain States to prosecute dealers using such stamps without having subscribed for the right so to do, and without having obtained the stamps by payment to the issuing company, is contrary to the decisions of the United States Supreme Court and to the provisions of the laws forbidding monopoly. Chatfield, J., issued a temporary injunction, saying, in part:

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[1] 227 Fed., 124 (D. C., 1915).

[2] Citing L. & N. R. R. Co. *v.* Mottley, 219 U. S., 467 (1911); Armour Packing Co. *v.* U. S., 209 U. S., 56 (1908); P. B. & W. R. R. Co. *v.* Schubert, 224 U. S., 603 (1912); Addyston Pipe & Steel Co. *v.* U. S., 175 U. S., 211 (1899); Portland Ry. Co. *v.* Oregon R. R. Comm., 229 U. S., 397 (1913); A. C. L. R. Co. *v.* Finn, 195 Fed., 685 (C. C. A., 1912); Holt *v.* Henley, 193 Fed., 1020 (C. C. A., 1912).

[3] 219 Fed., 755, 756 (D. C., 1915).

This statute [Clayton Act, sec. 3] forbids the converse of the acts complained of in the present action, and we have nothing to do with what might happen if the Green trading stamp people were seeking to forbid the use by its subscribers of any other kind of trading stamps. This might or might not be a restriction upon competition or tend to effect a monopoly.[1]

Section 29. The Act to Regulate Commerce.

In addition to the above, the provisions of the interstate-commerce law[2] making it a crime for a railroad to give, or for a shipper to receive, a rebate from the published tariffs of the railroads, as well as those provisions prohibiting unjust discrimination and the giving of undue preference to any shipper, may be regarded as directed at one form of unfair competition. A shipper who secures a lower rate than is enjoyed by his competitors, or who obtains an undue preference in some other form, is frequently in a position to exclude them from certain territory and thus to deprive the public entirely of competition in the particular locality. The administration of these provisions of the interstate-commerce law respecting rebates, unjust discriminations, and undue preferences is in large measure conferred on the Interstate Commerce Commission, and their enforcement is lodged with the said Commission and the courts. No attempt will be made in this report to summarize the decisions construing these provisions, but the portions of the statutes quoted below will serve to give a general idea of the unfair advantages in competition which it was intended to prevent:

* * * if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

* * * it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.[3]

* * * it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or

[1] Cf. Merchants' Legal Stamp Co. *v.* Murphy et al., p. 150n.
[2] 34 Stat. L., 587.
[3] 24 U. S. Stats., pp. 379–380.

foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. * * *

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.[1]

No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: *Provided*, That wherever the word "carrier" occurs in this Act it shall be held to mean "common carrier."[2]

A further relevant provision of the Interstate-Commerce law is that which prohibits common carriers or their agents from disclosing, without the consent of the shipper or consignee, any information concerning any shipment in interstate commerce made by them, and likewise makes it unlawful to solicit or knowingly receive such information. This part of the law is as follows:

It shall be unlawful for any common carrier subject to the provisions of this Act, or any officer, agent, or employee of such common carrier, or for any other person or corporation lawfully authorized by such common carrier to receive information therefrom, knowingly to disclose to or permit to be acquired by any person or corporation other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for interstate transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it

[1] 34 U. S. Stats., pp. 587–588. [2] 34 U. S. Stats., p. 587.

shall also be unlawful for any person or corporation to solicit or knowingly receive any such information which may be so used * * *[1]

The law also provides that whenever a carrier by railroad shall in competition with a water route reduce the rates on the carriage of any species of freight to or from competitive points it shall not be permitted to increase such rates unless after hearing it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.[2]

[1] 36 U. S. Stats., p. 553. This is a part of the act to create the Commerce Court, and was offered as an amendment by Senator Burton, who explained its purpose as follows: "It has developed in judicial proceedings in two instances that certain great industrial combinations maintain information bureaus. Those engaged in the work of these bureaus, by divers methods, none of which, I think, can be rated as commendable, obtain from railway corporations, or through their agents, information relating to the business of their minor competitors. For example, a great establishment ascertains that a competitor intends to ship into the State of Ohio, Indiana, or Texas a consignment of merchandise. The amount of that merchandise becomes known to the information bureau, and the name of the consignee is also ascertained. Using this information, a strenuous effort is made to prevent the competitor from disposing of his merchandise, from making any sales in the locality to which the shipment is made. An unfair advantage is thus given to the larger establishment, which enables it, in a measure, to crush out competition; I have a mass of information on this subject, if there is a desire that I should read it." (Congressional Record, June 1, 1910, vol. 45, Pt. VII, p. 7207.)

In the brief for the Government in U. S. *v.* Reading Company et al. (D. C. E. D. Pa.) it was stated that "in plain violation of this provision of law, defendant Reading Railway Co. made a practice of furnishing each morning to an employee of the defendant Reading Coal Co., sent to it for that purpose, a complete list of all the anthracite coal shipments transported over its lines and received by it at Philadelphia during the previous day, together with the names of all the shippers and consignees. * * * This practice continued until it was detected and complained of by an examiner of the Interstate Commerce Commission late in the year 1912."

The following sources of information indicate that manufacturers and dealers have engaged in the practice of bribing employees of railroads to disclose information concerning shipments of competitors: United States *v.* Standard Oil Co. of New Jersey (C. C. E. D. Mo.), 173 Fed., 177, 190 (1909), brief of facts and arguments of petitioner, Vol. II, pp. 358–428, and record, Vol. V, pp. 2503–2505, Vol. VI, pp. 3032–3033; State (Mo.) *v.* Standard Oil Co. of Indiana, Waters-Pierce Oil Co., and Republic Oil Co., 218 Mo., 1, 71, 72, 98, 102, 103, 105, 106, 115, 123, 174, 222, 285, 286, 397, 398; Report of the Commissioner of Corporations on the Petroleum Industry, Pt. I, p. 19, and Pt. II, p. 669.

By the decree in United States *v.* Burroughs Adding Machine Co. et al., the defendant company was directed to instruct its agents to desist from interfering with the business of competitors, by wrongfully obtaining information respecting the business, sales, or shipments of such competitors.

For testimony concerning efforts of the Southern Pacific Co. to secure copies of manifests of cargoes of the Philadelphia & Gulf Steamship Co.'s steamers, see hearings before the House Committee on the Merchant Marine and Fisheries in the investigation of shipping combinations under House resolution 587, 62d Cong., 2d sess., vol. 2, pp. 934–943.

The annual report of the Board of Directors of the New Jersey Lumbermen's Protective Association, submitted Feb. 20, 1906, contained the following: "In our last report we called attention to the necessity of bringing pressure to bear upon the various railroad companies to furnish the name of consignors of irregular shipments. * * *" (U. S. *v.* Eastern States Retail Lumber Dealers Association et al., record, Vol. IV, petitioner's Exhibit No. 13, p. 277; see also pp. 244–245.)

[2] 36 U. S. Stats., p. 548.

Section 30. Legislation prohibiting importation of articles bearing deceptive trade descriptions.

A section of the trade-mark act of 1905 prohibits the entry of merchandise which shall copy or simulate the name of any domestic manufacture, or manufacturer, or of any manufacturer located in any foreign country which affords similar privileges to citizens of the United States, or which shall copy or simulate a trade-mark registered in accordance with this act, or shall bear a name or mark calculated to induce the public to believe that the article is manufactured in the United States, or that it is manufactured in any foreign country or locality other than the country or locality in which it is in fact manufactured.[1]

[1] 33 U. S. Stats., 730; Customs Regulations of 1908, art. 315; Treasury Doc. 26198. A somewhat similar provision was contained in an act approved Mar. 3, 1871, prohibiting the importation of watches, watch cases, watch movements, or parts of watch movements of foreign manufacture, which shall copy or simulate the name or trade-mark of any domestic manufacturer, unless such domestic manufacturer is the importer of the same (16 U. S. Stats., 580). See also Tariff Acts, 26 U. S. Stats., 613; 28 U. S. Stats., 547, 548; 30 U. S. Stats., 207; In re Vintschger, 50 Fed., 459 (C. C., 1892); 21 Op. Atty. Gen., 260 (1895).

CHAPTER IX.

STATE STATUTES CONCERNING UNFAIR COMPETITION AND CERTAIN RELATED TRADE PRACTICES.

Section 1. Introduction.

There is a considerable volume of State legislation prohibiting certain dishonest or improper trade practices, some of which may be regarded as unfair competition. These laws are designed (1) to protect business men from competitive practices hurtful to them, and in some instances injurious to the purchasing public or to public morals as well; and (2) to protect the public from dishonest or fraudulent practices of manufacturers or dealers. The chief distinction between the two classes of statutes is that in the first the protection of the competitor appears to be the primary object, while in the second the protection of the public appears to be the dominant purpose. As an illustration of the first class may be mentioned laws making it criminal to offer a bribe or secret commission to the agent or employee of another for the purpose of influencing his conduct respecting his principal's or employer's business. One of the causes for the enactment of such laws was unquestionably the prevalence of the practice of giving buyers for commercial houses, domestics, and others, commissions on purchases made for their employers. In addition to preventing an abuse of the fiduciary relation of principal and agent which results in loss to the employer, these statutes protect the more scrupulous manufacturer or merchant who finds himself too often unable to sell in competition with those willing to resort to bribery in order to secure patronage. Statutes prohibiting the use by one corporation of a name previously adopted by another, or prohibiting manufacturers or dealers from representing, by marks, labels, or otherwise, that the goods of one manufacturer are those of another, are instances of legislation having a similar purpose but perhaps more clearly directed to the protection of the competitor. On the other hand, an example of laws apparently intended primarily to guard the purchasing public against fraud and imposition is found in those statutes forbidding false or misleading advertisements or the use of false marks respecting the quality of gold or silver ware. Laws of this character, however, incidentally protect the honest manufacturer or dealer from the competition of unscrupulous rivals.

Some of these statutes appear also to be a move in the direction of curtailing in a measure the liberality with which the common law regarded the statements of tradesmen respecting their own goods. So far as his competitors were concerned, at the common law the dealer could "puff" his own goods as much as he liked.[1] Laws prohibiting false or misleading advertisements constitute a limitation on the rule that the dealer may make any statements whatsoever respecting his goods, being responsible, if at all, only to the defrauded customer. In a number of jurisdictions at least, false statements in advertisements are prohibited, and to this extent manufacturers or dealers are protected against the loss of custom through the misrepresentations of less conscientious competitors. Similarly, if the quality of articles of commerce may not be misrepresented by marks or brands, not only the purchasing public is benefited, but the honest trader as well.

This chapter deals with legislation on the following subjects: (*a*) Bribery of employees; (*b*) adoption of corporate names already in use; (*c*) unauthorized use of names of corporations or individuals; (*d*) counterfeiting or fraudulent use of labels, marks, and brands; (*e*) passing off the goods of one person or corporation as those of another; (*f*) enticement of employees; (*g*) use of trading stamps; (*h*) false, deceptive, or misleading advertising; (*i*) misbranding or falsely marking goods; (*j*) conducting business under an assumed or fictitious name; and (*k*) placing loose handbills or advertising sheets in newspapers and magazines without the consent of the publisher. While the State laws against local discrimination in prices, exclusive and tying contracts, etc., some of which expressly term such practices unfair competition, would also be appropriate for discussion in this chapter, they are generally closely connected with antitrust legislation and have been considered in Chapter IV (see pp. 184–195), and reference thereto is sufficient in this connection. Several of the subjects treated in this chapter are discussed very briefly. For instance, the laws respecting the counterfeiting or the fraudulent use of labels, marks, and brands appear to have been passed primarily for the protection of trade-marks, or of marks or brands registered with State or local authorities. As explained elsewhere, it is unnecessary to include in this report any part of the American law respecting trade-marks, and for this reason these statutes are merely mentioned.

It has not appeared advisable to include other statutes intended primarily to protect the health or safety of employees or consumers. Broadly considered, all laws which prevent fraudulent business transactions of any description are beneficial to scrupulous manufacturers and dealers, but to attempt to include all such statutes would neces-

[1] See pp. 378n, 383n, 384n.

sitate the inclusion of a large volume of legislation both civil and criminal in character. For this reason only a few classes of statutes having a direct bearing on competitive conditions have been selected for presentation in this chapter.

Section 2. Bribery of employees.

The bribery of another's employees has been made a criminal offense in a number of States.[1] Although there are some variations in the terms of these statutes, they are similar in substance to an act passed in the State of New York. With respect to that statute, Justice Laughlin stated that—

> The corrupt practice of secretly offering bribes to servants, agents and employees, to induce them to place contracts for their masters or employers, had spread to such an alarming extent in this State that its viciousness and dishonesty and demoralizing tendencies attracted the attention of the Legislature at its session in 1905 and led it to declare it to be a misdemeanor to give or receive such a bribe, by enacting section 384r. of the Penal Code.[2]

The section above referred to is as follows:

> Whoever gives, offers or promises to an agent, employee or servant, any gift or gratuity whatever, without the knowledge and consent of the principal, employer or master of such agent, employee or servant, with intent to influence his action in relation to his principal's, employer's or master's business; or an agent, employee or servant who without the knowledge and consent of his principal, employer or master, requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself, under an agreement or with an understanding that he shall act in any particular manner to his principal's, employer's or master's business; or an agent, employee or servant, who, being authorized to procure materials, supplies or other articles either by purchase or contract for his principal, employer or master, or to employ service or labor for his principal, employer or master, receives directly or indirectly, for himself or for another, a commission, discount or bonus from the person who makes such sale or contract, or furnishes such materials, supplies or other articles, or from a person who renders such service or labor; and any person who gives or offers such an agent, employee or servant such commission, discount or bonus shall be guilty of a misdemeanor and shall be punished by a fine of not less than ten dollars nor more than five hundred dollars, or by such fine and by imprisonment for not more than one year.[3]

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[1] Connecticut Laws, 1905, ch. 99; Iowa Code Supp., 1907, secs. 5028 *n*, *o*.; Massachusetts Laws, 1912, ch. 495; Michigan Laws, 1905, No. 210; Nebraska R. S., 1913, sec. 8728; Nevada R. L., 1912, secs. 6786, 6796; New Jersey, 2 Comp. Stats., 1910, p. 1810, sec. 212e; New York Penal Law, sec. 439; North Carolina Penal Laws, 1913, ch. 190; Rhode Island Gen. Laws, 1909, ch. 349, secs. 21, 22; South Carolina Code, 1912, Cr. Code, sec. 277; Virginia Laws, 1906, ch. 260; Washington, Rem. & Bal. Code, secs. 2678, 2679; Wisconsin Stats., 1913, ch. 185, secs. 4575m, 4575n.

[2] Sirkin *v.* The Fourteenth Street Store, 124 N. Y. App. Div., 384, 387 (1908). And see Ballin *v.* The Fourteenth Street Store, 123 N. Y. App. Div., 582 (1908), where Justice Hooker observed that the facts "reflect one phase of an unfortunate condition which is all too prevalent in the business world, namely, the bribing by wholesale dealers of purchasing agents of prospective customers."

[3] New York Laws 1905, ch. 136; Penal Laws, sec. 439. See also Indiana Laws, 1907, ch. 120, prohibiting the bribery of railway employees, and 36 U. S. Stats., 553, prohibiting the disclosure by common carriers of information concerning shipments in interstate commerce, pp. 499–500, and note.

In the first successful prosecution under this act it appeared that the defendants, one of whom was the superintendent of the Conley Foil Co., had paid a workman to obtain employment with a competitor, and had subsequently received from him the names of its customers, the dimensions of certain machinery, and a sample of its foil.[1]

It may be noted that this act has been availed of by merchants to avoid payment for goods received and retained by them,[2] and unsuccessfully urged in an attempt to recover the entire sum expended for repairs to wagons which had since been worn out or destroyed.[3]

Section 3. Adoption of corporate names already in use.

GENERAL STATEMENT.—A number of States have statutes regulating the adoption of corporate names by domestic corporations. All of these statutes prohibit the adoption of a name already in use, while many also enjoin the taking of a name so similar to one already in use as to be likely to cause confusion. Those protected in the use of a previously adopted name are: Domestic corporations, foreign corporations which have been admitted to do business, companies, associations, and partnerships. Furthermore, it is provided in two States that a corporation can not adopt the name of a natural person unless words are used in connection therewith indicating the nature of the business to be carried on, followed by the style "Company," "Corporation," or "Inc." Some States provide that no foreign corporation will be admitted to do business under any name which is not plainly distinguishable from that of an existing domestic corporation, or that of a previously admitted foreign corporation. None of these statutes is of a penal nature, the effect being simply to prescribe certain conditions upon which charters or authority to do business shall be granted to corporations. In one

[1] People *v.* Edward Pergoll and James Flood, N. Y. Law Journal, Jan. 14, 1907. Per Deuel, J.: "In the present case the defendants did not attempt to suborn an actual employee; they hired a spy to go into the business house of Lehmaier, Schwartz & Company; they made it a condition that he become an employee; they made no payment until he became such employee; they resorted to the spy system, which is universally condemned, save in the enforcement of law and the detection of evildoers. Such methods in ordinary trade competition do not appeal to the sympathy of a court."

See also Applebee *v.* Skiwanek, 140 N. Y. Supp., 450 (1912), involving an attempt to secure knowledge of a secret process.

It appears that there have also been two successful prosecutions based on the giving of secret commissions to another's employees for the purpose of securing custom. See statement of Hooker, J., in Ballin *v.* The Fourteenth Street Store, 123 N. Y. App. Div., 582, 583 (1908), and Kelby, J., in Hearn et al. *v.* Schuchman, 141 N. Y. Supp., 242, 243 (1913).

[2] Sirkin *v.* The Fourteenth Street Store, 124 N. Y. App. Div., 384 (1908), reversing 55 N. Y. Misc., 288 (1907), and 54 N. Y. Misc., 135 (1907). Cf. Ballin *v.* Fourteenth Street Store, 123 N. Y. App. Div., 582 (1908), affirmed without opinion, 195 N. Y., 580 (1909).

[3] Hearn et al. *v.* Schuchman, 141 N. Y. Supp., 242; Schank et al. *v.* Schuchman, 212 N. Y., 352 (1914). See also Becket *v.* S. S. Hepworth Co., 129 N. Y. App. Div., 914 (1908); Rosenwasser *v.* Amusement Enterprises, 150 N. Y. Supp., 561 (1914). See, also, Sandford *v.* Miller, 80 N. J. Law, 411 (1910).

instance it is provided that a corporation which is doing business under a name assumed in violation of law may be enjoined from using such name, although its articles of organization may have been approved and a certificate of incorporation may have been issued to it.

DOMESTIC CORPORATIONS.—The Alabama statute provides that—

> A certificate of incorporation * * * shall set forth the name of the corporation; no name shall be assumed which is identical with that of any corporation already existing in this State, or so nearly similar thereto as to lead to confusion and uncertainty, nor shall the name of any person or partnership be assumed without the addition of some word or words designating the nature of at least one of the businesses to be carried on, followed by the word "company," "corporation," and "Inc."[1]

A similar statute is in force in Missouri.[2]

The provision respecting the adoption of corporate names in the Alaska statutes is as follows:

> The articles of incorporation * * * shall contain and state:
> The name of the corporation, which shall not be the same as, nor so similar as to cause confusion with, the name of any other domestic corporation or foreign corporation admitted to do business in this territory.[3]

Similar laws are found in Illinois,[4] Michigan,[5] Minnesota,[6] Utah,[7] and Washington.[8]

The corporation laws of Arizona provide that—

> The articles of incorporation must contain * * * name of the corporation, * * * provided, that not more than one corporation shall have the same corporate name.[9]

Similar provisions are contained in statutes of Colorado,[10] District of Columbia,[11] Florida,[12] New Hampshire,[13] Rhode Island,[14] and Vermont.[15]

The Delaware general corporation law requires that certificates of incorporation shall set forth:

> The name of the corporation, which * * * shall be such as to distinguish it from any other corporation engaged in the same business, or promoting or carrying on the same objects or purposes in this State.[16]

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[1] Alabama Civil Code, 1907, sec. 3446.
[2] Missouri Rev. Stats., 1909, sec. 2978.
[3] Laws of 1913, ch. 58.
[4] Laws of 1905, p. 130.
[5] Howell's Stats., 1913, sec. 9523.
[6] Gen. Stats., 1913, sec. 6147.
[7] Comp. Laws of 1907, sec. 314.
[8] Remington & Ballinger's Code (1910), sec. 3680.
[9] Rev. Stats., 1913, sec. 2100.
[10] Mills' Ann. Stats. (1912), sec. 976.
[11] Code, sec. 604.
[12] Comp. Laws, 1914, sec. 2676.
[13] Pub. Stats., 1901, ch. 147, sec. 3.
[14] Gen. Laws, 1909, ch. 212, sec. 2.
[15] Pub. Stats., 1906, sec. 4288.
[16] Gen. Corp. Law, 1899, sec. 5.

Similar statutes are in force in Connecticut,[1] Kentucky,[2] Missouri,[3] Nevada,[4] and Virginia.[5]

The Indiana law requires incorporators to make, sign, and acknowledge a certificate which shall state:

> The corporation name adopted by the company, which name shall not be the same as, or strikingly similar to, that of any existing corporation.[6]

Statutes of like purport and substantially similar wording are in force in California,[7] Idaho,[8] Mississippi,[9] Montana,[10] New Jersey,[11] New Mexico,[12] New York,[13] North Carolina,[14] Oregon,[15] Porto Rico,[16] West Virginia,[17] and Wisconsin.[18]

The Massachusetts[19] and Ohio[20] laws do not forbid unconditionally the adoption of a name already in use by any other domestic corporation, but require that as a condition precedent to the adoption of such name, the new corporation shall file with its articles of association the consent, in writing, of the corporation already using the same or similar name.

Under a provision of the Pennsylvania corporation law which requires certificates of incorporation to be presented to a law judge for approval,[21] it has been held that a certificate of incorporation may be lawfully refused if the name proposed to be adopted is the same as or similar to that of an existing corporation.[22]

FOREIGN CORPORATIONS.—A number of States provide that a foreign corporation having a name the same as or strikingly similar to that of a domestic corporation or a foreign corporation already doing business in the State shall not be admitted to the State under that name. The Indiana law on this subject is as follows:

> No foreign corporation having the same or strikingly similar name as any Indiana corporation, or having the same or strikingly similar name as any foreign corporation previously admitted to do business in this State, shall be admitted to do business in this State under such name.[23]

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[1] Pub. Acts, 1907, ch. 155.
[2] Kentucky Stats. (Carroll), 1915, sec. 539.
[3] Rev. Stats., 1910, sec. 3339.
[4] Rev. Laws, 1912, sec. 1108.
[5] Virginia Code, 1904, sec. 1105a.
[6] Burns' Ann. Stats. (1914), sec. 5062.
[7] Civil Code (Kerr), sec. 296.
[8] Laws, 1911, ext. sess., ch. 6, sec. 8.
[9] Code, 1906, sec. 936.
[10] Code, 1907, sec. 3825.
[11] Comp. Stats. (1910), p. 1603.
[12] Stats., 1915, sec. 891.
[13] Laws of 1913, vol. 1, ch. 24.
[14] Pell's Revisal of 1908, sec. 1137.
[15] Laws of 1913, ch. 220.
[16] Rev. Stats., 1911, sec. 413.
[17] Code, 1913, sec. 2899.
[18] Rev. Stats., 1913, sec. 1772.
[19] Supp. to Rev. Laws, 1902–1908, p. 876.
[20] Gen. Code, 1910, sec. 8628.
[21] Pepper & Lewis's Digest, 1907, col. 1699.
[22] American Clay Mfg. Co. v. American Clay Mfg. Co., 198 Pa. St., 189 (1901).
[23] Laws of 1907, pp. 286–290.

Similar statutes are in force in Florida,[1] Illinois,[2] Massachusetts,[3] Missouri,[4] New York,[5] and Vermont.[6]

Section 4. Unauthorized use of names of corporations or individuals.

In two States statutes are found which make it a criminal offense for any corporation to use a name which is the same as or similar to that used by any other corporation. The Georgia penal code provides that—

> Any firm, person, corporation, or association who shall use the name or seal of any other person, firm, corporation or association, in or about the sale of goods or otherwise, not being authorized to use the same, knowing that such use is unauthorized, with intent to deceive the public in the sale of goods, shall be guilty of a misdemeanor.[7]

The Maryland law provides—

> It shall be unlawful for any individual, firm, partnership, corporation, association or joint stock company with intent to defraud to trade, do or transact any business in the State of Maryland under any name, trade name or title, which is the same as, or similar to, that used by any other individual, firm, partnership, corporation, association or joint stock company, previously using, trading or doing business under such name, trade name or title in the State of Maryland, or to imitate such name, trade name or title, Provided that this Act shall not apply to individuals possessing similar names.[8]

INDIVIDUAL NAMES.—In addition to the Georgia and Maryland statutes above quoted there is a Massachusetts law which prohibits one person from assuming the name of any other person without the latter's consent, and authorizes the courts to restrain such use of individual names. The act is in part as follows:

> A person who carries on business in this commonwealth shall not assume or continue to use in his business the name of a person formerly connected with him in partnership or the name of any other person, either alone or in connection with his own or with any other name or designation, without the consent in writing of such person or his legal representatives.[9]

Section 5. Counterfeiting or fraudulent use of labels, marks, and brands.

COUNTERFEITING.—Statutes prohibiting the counterfeiting or imitating of labels, marks, and brands are in force in 21 States and in the District of Columbia.[10] Most of these statutes appear to have been passed primarily for the protection of trade-marks, and the

[1] Comp. Laws, 1914, sec. 2682h.
[2] Laws of 1905, p. 130.
[3] Revised Laws, 1902, ch. 126, sec. 8.
[4] Rev. Stats., 1909, sec. 3039.
[5] Cons. Laws, ch. 23, sec. 15.
[6] Pub. Stats., 1906, sec. 774.
[7] Park's Penal Code (1914), sec. 257.
[8] Maryland Laws, 1910, ch. 595.
[9] Rev. Laws (1902), ch. 72, sec. 5.
[10] Statutes relating to union labels have been omitted.

extent of their application to nontechnical marks, labels, etc., appears to be somewhat doubtful. For this reason nothing more than the references to them are given.[1]

The same comment applies to statutes affording similar protection to labels, marks, and brands which have been registered with the various State authorities. Such statutes are to be found in 14 States and in Porto Rico.[2]

FRAUDULENT USE OF GENUINE LABELS, MARKS, AND BRANDS.—This is prohibited in general terms by the following Kentucky statute:

SEC. 1. That no dealer or merchant shall make or apply or cause to be made or applied to any parcel or package any printed, written, stamped, engraved or other kind or character of label bearing the brand or name or both such brand and name of any manufacturer without the written authority of said manufacturer.

SEC. 2. Any person, firm or corporation violating the provisions of this act shall be fined in any sum not less than ten nor more than fifty dollars for each offense.[3]

In addition, there are statutes in 38 States, Porto Rico and the District of Columbia which prohibit the refilling and reselling of labeled, marked, or branded containers by persons other than those who originally filled and sold them. Whether the protection of these statutes is limited to containers bearing technical trade-marks is also doubtful, and hence their citations only are given.[4]

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[1] Arizona Penal Code (1913), secs. 350–353; District of Columbia Code, sec. 879; Georgia Penal Code (1911), secs. 254, 255; Idaho Rev. Codes, secs. 6862–6865; Illinois J. & A. Ann. Stats. (1913), secs. 3696, 3697; Iowa Code (1897), sec. 5047; Maine Rev. Stats. (1903), ch. 40, sec. 26; Massachusetts Rev. Stats. (1902), ch. 72, secs. 2, 3, 6; Michigan, Howell's Stats. (1913), secs. 14713–14716; Minnesota Gen. Stats. (1913), secs. 8852–8857; Mississippi Code (1906), secs. 1380–1382; Missouri Rev. Stats. (1909), secs. 11789–11796; Nebraska Rev. Stats. (1913), secs. 8701, 8705; Nevada Rev. Laws (1912), secs. 6689–6690; New Jersey Comp. Stats. (1910), p. 1802, sec. 196; New York Penal Law, secs. 2350–2354; North Dakota Comp. Laws (1913), secs. 9711–9718; Ohio Gen. Code (1910), secs. 13089, 13091; Oregon, Bellinger and Cotton's Code, sec. 1840; South Dakota Penal Code, secs. 423–427; Wisconsin Stats. (1913), sec. 4463; Wyoming Comp. Stats. (1910), sec. 3060.

[2] California Penal Code (Kerr), secs. 350–353; Colorado, Mills' Ann. Stats. (1912), secs. 7557–7561; Connecticut Gen. Stats. (1902), secs. 4904–4906; Indiana, Burns' Ann. Stats. (1914), secs. 10441–10452; Massachusetts Rev. Stats. (1902), ch. 72, secs. 7–14; Montana Rev. Codes (1907), secs. 8447–8450; Nevada Rev. Laws (1912), secs. 6691–6694; New Jersey Comp. Stats. (1910), pp. 5643–5648; New Mexico Stats. (1915), sec. 5559; North Carolina, Pell's Rev. of 1908, secs. 3019–3022; Oregon Laws (1911), ch. 97; Pennsylvania, P. & L. Digest, cols. 7315–7318; Porto Rico Rev. Stats. (1911), secs. 5759, 5760; Utah Comp. Laws (1907), secs. 4482–4485; Vermont Pub. Stats. (1906), secs. 4962–4967, as amended by Pub. Acts, 1908, No. 121.

[3] Kentucky, Acts 1912, ch. 51, p. 205.

[4] Alabama Code (1907), secs. 7318–7321; Arizona Penal Code (1913), sec. 354; Arkansas, Kirby's Digest (1904), secs. 7969–7973; California Penal Code (Kerr), secs. 354½–354⅔, Laws of 1911, ch. 230; Colorado, Mills' Ann. Stats. (1912), secs. 7570–7576, inc.; Connecticut Pub. Acts (1911), ch. 208; District of Columbia Code, sec. 878; Florida Comp. Laws (1914), secs. 3345, 3346; Indiana, Burns' Ann. Stats. (1914), sec. 10439; Idaho Laws (1911), ch. 212; Iowa Code Supp. (1907), sec. 5052; Kansas Stats. (1909), secs. 9670–9674; Maine Rev. Stats. (1903), ch. 40, secs. 37–39; Maryland Code, art. 27, secs. 331–335; Massachusetts Rev. Stats. (1902), ch. 72, secs. 15–18; Michigan, Howell's Stats. (1913), secs. 4341–4343; Minnesota Gen. Stats. (1913), secs. 6951, 6952; Missouri Rev. Stats. (1909), sec. 4831; Montana Rev. Stats. (1907), sec. 8451; Nebraska Rev. Stats. (1913), secs. 8869–8895; New Hampshire Laws (1903), ch. 120; New Jersey Comp.

Section 6. Passing off the goods of one person or corporation as those of another.

Apparently the only State statute which applies comprehensively to the whole subject of passing off the goods or establishment of one person or corporation as those of another is found in New York. This enactment is in part as follows:

A person who: * * *

Shall sell or shall expose for sale any goods in bulk, to which no label or trade-mark shall be attached, and shall by representation, name or mark written or printed thereon, represent that such goods are the production or manufacture of a person who is not the manufacturer; or,

Shall knowingly sell, offer or expose for sale any article of merchandise, and shall orally or by representation, name or mark written or printed thereon or attached thereto used in connection therewith, or by advertisement, or otherwise, in any manner whatsoever make any false representation as to the person by whom such article of merchandise or the material thereof was made, or was in whole or in part produced, manufactured, finished, processed, treated, marketed, packed, bottled or boxed, or falsely represents that such article of merchandise or the material or any part thereof has or may properly have any trade-mark attached to it or used in connection with it, or is or may properly be indicated or identified by any trade-mark,

Is guilty of a misdemeanor * * *.[1]

Section 7. Enticement of employees.

Twelve States,[2] the District of Columbia, Hawaii, and the United States, have laws prohibiting the enticing away of employees, that of the United States being applicable only to employees in arsenals or armories. With the exception of the Tennessee statute, which forbids the enticement of any person under contract or in the employ of another, and of the Maine law, which prohibits employment agencies from inducing any employee to leave his employment, these laws are limited in their application to certain classes of employment. Considered in the aggregate, they apply to the following employees:

Stats. (1910), pp. 293–299; New Mexico Stats. (1915), sec. 5558; New York Penal Law, secs. 2355–2357, general business law, secs. 360–367; Louisiana Acts (1896), No. 120, as amended by Acts 1904, No. 74; North Carolina, Revisal of 1908 (Pell's), secs. 3027a–3027d; North Dakota Comp. Laws (1913), secs. 9719–9721; Ohio Gen. Code (1910), sec. 13111; Oklahoma Comp. Laws, secs. 8207–8209; Pennsylvania, Pepper and Lewis's Dig., 2d ed., pp. 7319–7324; Porto Rico Rev. Stats. (1911), secs. 5763–5765; Rhode Island Gen. Laws (1909), ch. 198; South Dakota Penal Code, secs. 428–430, Laws 1903, ch. 83, sec. 1; Texas, White's Penal Code, arts. 918a to 918c; Utah Comp. Stats. (1907), secs. 4475x, 4486; Vermont Pub. Stats. (1906), secs. 4968–4972; Virginia Code (1904), sec. 1906a; West Virginia Code (1913), secs. 3598–3600; Washington, Remington and Ballinger's Code (1910), secs. 9501–9503; Wisconsin Stats. (1913), secs. 1747a–1–1747dd.

[1] New York Laws (1914), vol. 2, ch. 332.

[2] Alabama Code (1907), secs. 6849, 6850; Arkansas Laws (1905), Act. No. 298; Florida Comp. Laws (1914), sec. 3232; Georgia Penal Code, sec. 123; Kentucky, Carroll's Stats. (1915), sec. 1349; Louisiana Acts (1906), No. 54; Maine Laws (1911), ch. 87, sec. 4; Mississippi Code (1906), sec. 1146; New Jersey Comp. Stats. (1910), p. 2205; North Carolina, Pell's Rev. of 1908, secs. 3365, 3367; South Carolina Crim. Code (1912), sec. 504, as amended by Acts 1913, No. 28; Tennessee Acts (1907), ch. 154; U. S. Stats. L., vol. 34, p. 308 (D. C.); Hawaii Rev. Laws (1915), sec. 4201; U. S. Stats. L., vol. 35, p. 1097.

Apprentices,[1] servants,[2] domestics,[3] laborers,[4] tenants,[5] share croppers,[6] and artificers.[7] The laws of the District of Columbia, Maine, and New Jersey apply only to enticement by employment agencies. A violation of these statutes is punishable criminally in all jurisdictions save one,[8] where a civil liability alone is prescribed, while in five jurisdictions,[9] there is imposed both a criminal and a civil liability, the measure of damages under the latter usually being the losses incurred by reason of the enticement. In Alabama a sum in no case less than double the damages may be recovered in a civil action, one-half of which goes to the injured employer and the other half to the county in which the offense occurs; and in Louisiana the injured employer is allowed double the amount of any debt owed him by the enticed employee.

Also in several States,[10] early statutes enacted to prevent the enticement of lawfully bound apprentices are still in force. The violation of these statutes was usually punished by either fine or imprisonment, or both.

Section 8. Use of trading stamps.

GENERAL STATEMENT.—The trading stamp has been very generally employed by merchants in recent years as a device to induce patrons to confine their trade to them and to attract new customers. The value of the stamps represents a small percentage of the purchase price of goods and they are usually given only to cash purchasers. The stamps are redeemable in goods, or sometimes in money or goods, either by the establishment giving them or by the company which sold the stamps to the dealer. Very generally the stamps are sold to merchants by companies organized for the purpose of engaging in this business, and are redeemed by the trading-stamp company after being issued by the merchant to his customers. Some merchants, however, have adopted the policy of issuing and redeeming their own stamps. It is common, also, for manufacturers to issue coupons with their products redeemable by the consumer in "premiums."

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[1] Alabama.

[2] Alabama, Florida, Georgia, Hawaii, North Carolina, and South Carolina.

[3] District of Columbia and New Jersey.

[4] Alabama, Arkansas, Florida, Georgia, Hawaii, Kentucky, Mississippi, South Carolina, and United States.

[5] Alabama, Arkansas, Florida, Louisiana, Mississippi, North Carolina, and South Carolina.

[6] Alabama, Georgia, Louisiana, Mississippi, and North Carolina.

[7] United States.

[8] Tennessee.

[9] Alabama, Arkansas, Kentucky, Louisiana, and Mississippi.

[10] Connecticut Gen Stats., sec. 1250; Florida Comp. Laws (1914), sec. 3231; Georgia Penal Code, sec. 121; Illinois, J. and A. Ann. Stats., sec. 455; Kentucky, Carroll's Stats. (1915), sec. 2601; Missouri Stats. (1909), sec. 4817; Nevada Rev. Laws (1912), sec. 495; New Hampshire Pub. Stats. (1901), ch. 180, sec. 12; North Carolina, Pell's Rev. of 1908, sec. 193; and Ohio Gen. Code, sec. 8018.

When the stamps are sold to merchants by trading-stamp companies the latter usually agree to distribute to the public books containing the names of merchants giving the stamps and explaining the method of issuing and redeeming them, and in other ways to advertise the merchants. By agreement between the stamp company and merchants, the right to distribute the stamps is usually limited to one merchant within a specified area.

There has been considerable legislation enacted in recent years for the purpose of abolishing the use of trading stamps. The advocates of legislation of this class urge that the use of the stamps tends to monopoly, fosters combinations, and restrains trade by restricting open competition; and that in so far as the business is conducted by stamp companies it is a mere intervention between the buyer and seller of a third party preying upon both. They further assert that it adds to the cost of living by imposing a useless tax on the community, leads to the sale of inferior goods, and encourages indiscriminate buying. The opponents of legislation prohibiting the use of stamps urge, however, that their use is merely a method or scheme of advertising and that they afford a ready means of giving a small discount to cash purchasers. They further characterize the efforts to prohibit their use as attempts to protect one class from the fair, free, and full competition of another class.

Legislation affecting the use or distribution of trading stamps may be broadly divided into two classes, (1) That which is apparently designed to abolish their use entirely or to tax them out of existence, and (2) that which is intended to regulate the issuance and redemption of such stamps.

LEGISLATION PROHIBITING THE USE OF TRADING STAMPS.—Antitrading stamp legislation proper did not begin in the United States until 1898. Unsuccessful attempts, however, were previously made in Massachusetts, New York, Pennsylvania, and Maryland to prevent gifts or premiums by merchants to their customers under existing statutes against (1) any offer with the sale of any article,[1] or any article of food,[2] of anything except what was stated to be the subject of the sale, (2) "lottery gifts by storekeepers and others,"[3] and (3) gift enterprises.[4]

The New York act was held to invade constitutional rights under the guise of the police power, and was characterized by the Court of Appeals as belonging to a type of legislation intended to protect one class against the free, fair, and full competition of another class.[5]

[1] Massachusetts Laws (1884), ch. 277.
[2] New York Laws (1887), ch. 691; South Carolina Laws (1887), No. 397.
[3] Pennsylvania Laws (1885), No. 36.
[4] Maryland Laws (1886), ch. 480.
[5] People *v.* Gillson, 109 N. Y., 389 (1888).

A similar statute in South Carolina appears not to have been construed. In passing upon the Massachusetts statute the court said that it did not forbid the sale of two things at once, even though one was the particular object desired and the other an additional inducement.[1] Although the body of the Pennsylvania act forbade the gift or sale of any ticket, check, token, or memorandum entitling the holder to money or any article of value, it was held void on the technical ground that its title, mentioning lottery gifts merely, did not sufficiently indicate its purpose.[2] In Maryland, a statute prohibiting gift enterprises not involving chance was held to be an unwarrantable exercise of the police power.[3]

The first attempt to prevent the use of stamps issued by trading-stamp companies by invoking a gift enterprise statute was in the District of Columbia, where the statute declares that every person who in any manner holds out the promise of gift or bestowal of any article or thing for and in consideration of the purchase of any other article or thing shall be regarded as engaged in a gift enterprise, and prohibits gift enterprises as thus defined and in general terms.[4] The statute thus construed was upheld on the ground that the trading-stamp company is a device for getting something for nothing, and hence may be controlled under the police power, no matter whether its operation involves chance or not. In emphasizing the fact that the application of the statute to merchants was not being passed upon, the court said:

> That it was not intended to apply to ordinary discounts for cash, or in proportion to amounts of purchases when made by the merchant himself to his customers, may be regarded as certain and the exercise of such power would doubtless be denied if expressly attempted.[5]

Provisions substantially identical with the above,[6] however, have since been held invalid in Colorado and Nebraska if designed to prohibit the trading-stamp business. They were there regarded, when thus applied, as attempts to prohibit legitimate business that was not obnoxious to public morals or detrimental to the public welfare,[7] and thus to invade constitutional rights under the guise of the police power.[8] And in 1911 when the Massachusetts Legislature was considering the adoption of the District of Columbia statute the justices of the Supreme Judicial Court gave it as their opinion that the

[1] Commonwealth *v.* Emerson, 165 Mass., 146 (1896).
[2] Com. *v.* Moorhead, 7 Pa. Co. Ct., 513 (1890).
[3] Long *v.* State, 74 Md., 565 (1891).
[4] District of Columbia Laws. 1871–1872, p. 96, and R. S. D. C., secs. 1176–1177.
[5] Lansburgh *v.* District of Columbia, 11 Apps. D. C., 512 (1897). Followed in D. C. *v.* Kraft, 35 Apps. D. C., 253 (1910), and D. C. *v.* Gregory, 35 Apps. D. C., 271 (1910).
[6] Denver Ordinance No. 62, 1904; Nebraska Laws, 1911, ch. 179.
[7] Denver *v.* Frueauff, 39 Colo., 20 (1906).
[8] State *v.* Sperry & Hutchinson Co., 94 Nebr., 785 (1913).

statute would be unconstitutional as "there is nothing in the conduct proposed to be prohibited that necessarily appeals to the gambling instinct or involves the element of chance."[1] Statutes in Alabama and Kansas[2] prohibiting gift enterprises, without any definition of the term, have also been held not to apply to the trading-stamp business as usually conducted.[3] A Michigan act so defining a gift enterprise as to cover the trading-stamp company has not apparently been construed.[4]

Statutes intended to prohibit the operation of trading-stamp companies are much more numerous. Laws have been passed in a number of States prohibiting the issuance or redemption of stamps by any person other than a merchant or manufacturer.[5] In all these States except Rhode Island and Vermont it is expressly provided that the retail merchant may give coupons issued by manufacturers with their products. These statutes have been held unconstitutional in New Hampshire,[6] New York,[7] Rhode Island,[8] Vermont,[9] and Virginia,[10] as an unwarranted interference with individual liberty and a violation of the fourteenth amendment to the Federal Constitution, as a violation of similar clauses in State constitutions, or as an unlawful exercise of the police power. A Massachusetts statute of this character was held not to prohibt the use of trading stamps to be redeemed by a stamp company unless there was an element of chance involved in the transaction.[11] The Louisiana statute was declared void on the ground that its title was inadequate and misleading.[12] In construing a Maryland statute of another type the court said that if the stamps were otherwise free from objection it was immaterial whether they were to be redeemed by the merchant selling the goods or by a third party.[13] A Michigan statute of this character has not been construed in any reported case.

[1] Opinion of the Justices, 208 Mass., 607 (1911).
[2] Alabama Laws (1891), No. 352; Kansas Laws (1895), ch. 152.
[3] State *v.* Shugart, 138 Ala., 86 (1903); United Jewelers Mfg. Co. *v.* Keckley, 77 Kans., 797 (1907).
[4] Michigan Laws (1911), No. 244.
[5] Louisiana Laws (1900), Act No. 35; Maryland, Laws 1898, ch. 207, Laws 1904, chs. 233, 577, Laws 1910, ch. 381, p. 95; Massachusetts Laws (1898), ch. 576; Michigan Laws (1911), No. 244; New Hampshire Laws (1899), ch. 60; New York Cons. Laws, Penal Law, secs. 2360, 2361; Rhode Island Laws (1899), ch. 652; Vermont Laws (1898), No. 123; Virginia Laws (1897–98), ch. 406, p. 442.
[6] State *v.* Ramseyer, 73 N. H., 31 (1904).
[7] People *v.* Dycker, 72 N. Y. App. Div., 308 (1902); People *v.* Zimmerman, 102 N. Y. App. Div., 103 (1905).
[8] State *v.* Dalton, 22 R. I., 77 (1900).
[9] State *v.* Dodge, 76 Vt., 197 (1904).
[10] Young *v.* Commonwealth, 101 Va., 853 (1903).
[11] Commonwealth *v.* Sisson, 178 Mass., 578 (1901).
[12] State *v.* Walker, 105 La., 492 (1901).
[13] State *v.* Hawkins, 95 Md., 133 (1902).

Taxes or license fees on the use of trading stamps have been imposed in a dozen or more States.[1] These are sometimes limited to trading-stamp companies, but some of the statutes and ordinances are so worded as to include both trading-stamp companies and merchants using stamps put out by such companies, and others are apparently intended to cover even the merchant who issues and redeems his own stamps.

In their application to trading-stamp companies such taxes, whether laid directly by the State or by the city under charter authority,[2] and whether for revenue or regulation, have generally not been successfully attacked in State courts.[3] Intimations and holdings that the tax must be reasonable, however, are found in decisions by State courts[4] and some ordinances have been declared void by them as in excess of delegated authority.[5] And tax provisions in Arkansas, Oregon, and Washington have been held by Federal courts to be oppressive or to be an invasion of the trading-stamp company's constitutional rights.[6] In the Arkansas case the court declared the ordinance in question to be in excess of charter authority. Later, after the legislature had specifically authorized cities to tax the use of trading stamps, a city ordinance levying a still heavier tax was upheld by a different Federal court as a valid regulation under the police power.[7]

When applied to merchants using stamps put out by trading-stamp companies or to merchants issuing and redeeming their own stamps, tax provisions have been held void wherever called in question,[8] ex-

[1] Alabama Laws (1909), p. 229; Arkansas Laws (1899), No. 21; Florida Laws (1913), ch. 6421, secs. 35, 55; Kentucky Stats., sec. 4224; Louisiana Laws (1904), No. 47; Massachusetts Laws (1904), ch. 403; New Hampshire Laws (1905), ch. 83; North Carolina Laws (1913), ch. 201, secs. 51, 75; Oregon Laws (1915), ch. 228; Tennessee Laws (1899), chs. 27, 207; Utah Laws (1915), chs. 116, 117; Washington Laws (1913), ch. 134; West Virginia, Laws 1904, ch. 3; Laws 1905, ch. 36; Code 1913, secs. 1114j, 1155, 1232.

[2] Authority to tax gift enterprises is held not to be authority to tax the use of trading stamps. Winston *v.* Beeson, 135 N. C., 271 (1904); Humes *v.* Little Rock, 138 Fed., 929 (1898).

[3] Gamble *v.* Montgomery, 147 Ala., 682; State *v.* Merchants Trading Stamp Co., 114 La., 529 (1905); Fleetwood *v.* Read, 21 Wash., 547 (1899); Oilure Mfg. Co. *v.* Pidduck-Ross Co., 38 Wash., 137 (1905); Sperry & Hutchinson Co. *v.* Tacoma, 68 Wash., 254 (1912); State *v.* Pitney, 79 Wash., 608 (1914).

[4] Gamble *v.* Montgomery, 147 Ala., 682; Columbia *v.* Lusk, (Ct. Com. Pleas, Richland Co., S. C., September, 1909); Sperry & Hutchinson Co. *v.* Danville (Corp. Ct., Danville, Va., October, 1910).

[5] Winston *v.* Beeson, 135 N. C., 271 (1904); Merchants Trading Stamp Co. *v.* Memphis, 101 Tenn., 181 (1898); Sperry & Hutchinson Co. *v.* Owensboro, 151 Ky., 389 (1912).

[6] Humes *v.* Little Rock, 138 Fed., 929 (1898); Ex parte Hutchinson (Wash.), 137 Fed., 949 (1904); Ex parte Hutchinson (Oreg.), 137 Fed., 950 (1905).

[7] Humes *v.* Fort Smith, 93 Fed., 857 (1899).

[8] Montgomery *v.* Kelly, 142 Ala., 552 (1905); Humes *v.* Little Rock, 138 Fed., 929 (1898); Ex parte McKenna, 126 Cal. 429 (1899); Van Deman & Lewis Co. *v.* Rast, 208 Fed., 827 (Fla., 1913); Hewin *v.* Atlanta, 121 Ga., 723 (1905); Com. *v.* Gibson, 125 Ky., 401 (1907); O'Keefe *v.* Somerville, 190 Mass., 110 (1906); Columbia *v.* Lusk, (Ct. Com. Pleas, Richland Co., S. C., Sept., 1909); Merchants Trading Stamp Co. *v.* Memphis, 101 Tenn., 181 (1898); Ex parte Hutchinson, 137 Fed., 949 (1904); Ex parte Hutchinson, 137 Fed., 950 (1905); S. & H. Co. *v.* Tacoma, 190 Fed., 682 (1911); Little *v.* Tanner, 208 Fed., 605 (Wash., 1914).

cept in Washington[1] and in the Federal court in Arkansas mentioned above.[2] As thus applied these statutes are usually said to infringe the liberty guaranteed by the Federal and State Constitutions or to amount to class legislation. In Massachusetts the giving of stamps in connection with sales of goods was said not to be a commodity within the special taxing power, and in Georgia it was said not to be "a business," and hence was not to be reached under the city's taxing power. The provisions that have been upheld were declared to be proper exercises of the police power.

The conflict on tax statutes in Washington between State and Federal courts was partly responsible for the Washington court in 1907 declaring a statute void that prohibited offering unidentified or chance premiums in exchange for trading stamps.[3] In a recent decision on trading-stamp legislation, however, the Washington court expressly overrules this decision, and upholds, as a valid exercise of the police power, a taxing statute conceded to be prohibitive of the use of trading stamps.[4]

STATUTES REGULATING THE USE OF TRADING STAMPS.—A number of statutes have been passed which regulate more or less strictly the trading-stamp business. The restrictions in some of these laws are so onerous that they have been regarded by the courts as prohibitory and declared to be unconstitutional. The most common provision is that which prohibits the issuance of stamps under such circumstances that the purchaser of goods does not know at the time what articles he is entitled to receive for the stamps. A number of States prohibit the issuance of stamps redeemable in articles variously described in the laws as "indefinite," "undescribed," "undetermined," "unidentified," "unknown," or "unselected," or where the selection is dependent upon chance, hazard, or contingency.[5] A number of these laws have been declared void as in violation of constitutional provisions that no person shall be deprived of life, liberty, or property without due process of law or as not a valid exercise of the police power.[6] The Washington decision was, however, expressly

[1] Fleetwood *v.* Read, 21 Wash., 547 (1899); Oilure Mfg. Co. *v.* Pidduck-Ross Co., 38 Wash., 137 (1905); State *v.* Pitney, 79 Wash., 608 (1914).

[2] Humes *v.* Fort Smith, 93 Fed., 857 (1899).

[3] Leonard *v.* Bassindale, 46 Wash., 301 (1907).

[4] State *v.* Pitney, 79 Wash., 608 (1914). This case is pending in the United States Supreme Court.

[5] California Laws (1905), ch. 69 (Henning's Gen. Laws of Cal., 1914, act No. 5216, p. 2092); Colorado Laws (1905), ch. 110 (Mills' Ann. Stats., 1912, secs. 4685, 4686, 4687, 4688); Georgia Penal Code (1914), sec. 404 (Laws 1909, p. 153); Iowa Laws (1909), ch. 226; Maryland Laws (1898), ch. 207 (Laws 1904, chs. 233, 577; Laws 1910, chs. 381, p. 95); Massachusetts Laws (1903), ch. 386 (Supp. Rev. Laws Mass., 1902–1908, p. 1446); Minnesota Laws (1909), ch. 142 (Gen. Stats., 1913, secs. 8995–8998); New Hampshire Laws (1905), ch. 83; Rhode Island Laws (1901), ch. 842 (Gen. Laws 1909, p. 1284); Washington Laws (1905), ch. 179; and Laws of Hawaii (1905), act 85.

[6] Ex parte Drexel, 147 Cal., 763 (1905); Leonard *v.* Bassindale, 46 Wash., 301 (1907); Hawaii *v.* Gunst & Co., 18 Hawaii, 196 (1907).

overruled in 1914 in a case holding a tax on trading stamps valid even though it was regarded as prohibitive.[1] A Maryland statute was held valid in one case, so far as it prohibited uncertain, undetermined, or unknown premiums,[2] but in a subsequent case it was held valid only so far as it prohibited an element of chance, partaking of the nature of a lottery and appealing to the gambling instinct, in the determination of the premium.[3] The Georgia act was also held not to apply to the trading-stamp business as ordinarily conducted.[4] Statutes requiring articles in which stamps are to be redeemed to be described on the stamp, and the character and value thereof made known to the purchaser, or requiring that the purchaser be furnished with a list of all articles given in redemption of stamps, have likewise been held to be practically prohibitive of the business and unconstitutional as not being a proper exercise of the police power.[5] Other statutes of the same general character as those described above appear not to have been passed upon by the courts.[6] A number of statutes require that trading stamps shall have a redeemable value in money, which shall be legibly shown on the face of the stamp, that they shall be redeemed at their face value in goods or money at the option of the holder, and that the vendor of goods shall be liable for the redemption of the stamps upon the default of the third party and may be primarily liable.[7] A statute of this character has been held invalid,[8] and another of the same general nature, but with the added requirement that each stamp should have the value of not less than 1 cent and should be redeemed even though presented singly, has likewise been held unconstitutional.[9]

Section 9. False, deceptive, or misleading advertising.

Twenty-eight States,[10] one municipality,[11] and the Philippine Islands prohibit the publication or circulation of false or mislead-

[1] State *v.* Pitney, 79 Wash., 608 (1914). Appeal pending.

[2] State *v.* Hawkins, 95 Md., 133 (1902).

[3] State *v.* Caspare et al., 115 Md., 7 (1911)

[4] Tumlin *v.* State, 141 Ga., 613 (1914).

[5] State *v.* Friedman, District Court, Wapello County, Iowa (Oct., 1910); State *v.* Caspare et al., 115 Md., 7 (1911); State *v.* Sperry & Hutchinson Co., 110 Minn., 378 (1910).

[6] Colorado Laws (1905), ch. 110 (Mills' Ann. Stats. 1912, secs. 4685–4688); Massachusetts Laws (1903), ch. 386 (Supp. Rev. Laws, Mass., 1902–1908, p. 1446); New Hampshire Laws (1905), ch. 83; Rhode Island Pub. Laws (1901), ch. 842 (Gen. Laws, 1909, p. 1284).

[7] Indiana Laws (1913), ch. 299 (Burns' Ann. Stats., 1914, sec. 10463a to 10463f); Maryland Laws (1904), chs. 233, 577 (Laws 1910, ch. 381, p. 95); New Hampshire Laws (1905), ch. 83; New Jersey Laws (1905), ch. 265 (Comp. St., p. 5648); New York Cons. Laws, Penal Law, sec. 2361; Ohio Laws (1904), p. 277 (General Code, secs. 6386 to 6389); Washington Laws (1907), ch. 253.

[8] People *v.* Zimmerman, 102 N. Y. App. Div., 103 (1905).

[9] State *v.* Caspare et al., 115 Md., 7 (1911).

[10] California, Connecticut, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Washington, West Virginia, Wisconsin.

[11] Chicago.

ing advertisements concerning property which is offered for sale. These laws are, as a rule, of very recent date, practically all of them having been passed in 1913 or 1914. They fall into two general classes, first, those which prohibit any representation or statement of fact respecting the property offered for sale which is untrue, deceptive, or misleading, and, second, those which prohibit untrue or misleading statements of the kinds specified in the acts. These latter statutes apply only to specific kinds of property or services. Statutes of the first class are so nearly alike in scope and verbiage that a fair idea of them all may be conveyed by quoting a part of the New Jersey act,[1] which is as follows:

> Any person, firm, corporation or association who, with intent to sell or in any wise dispose of merchandise, securities, service, or anything offered by such person, firm, corporation or association, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, makes, publishes, disseminates, circulates, or places before the public or causes, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this State, in a newspaper or other publication, or in the form of a book, notice, hand-bill, poster, bill, circular, pamphlet or letter or in any other way, an advertisement of any sort regarding merchandise, securities, service, or anything so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading, shall be guilty of a misdemeanor.

A number of States have substantially similar laws.[2] It may be noted that the Iowa, Kansas, Michigan, Washington, and Wisconsin acts expressly exempt publishers of newspapers from liability for the publication of such advertisements if made in good faith.

A Chicago municipal ordinance[3] is similar to the New Jersey law, except that its application is limited to advertisements in newspapers or other publications, or to signs, banners, handbills, or placards, offered for sale or exposed on streets, sidewalks, or public grounds over which the city has control.

In California, Connecticut, Indiana, Maryland, Massachusetts, Montana, Oregon, Pennsylvania, and South Dakota the statutes[4]

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[1] New Jersey Laws (1913), ch. 318.

[2] Idaho Laws (1915), ch. 23; Iowa Laws (1913), ch. 309; Kansas Laws (1915), ch. 2; Louisiana Acts (1914), ch. 162; Michigan Laws (1913), Act No. 276; Minnesota Laws (1913), ch. 51; Missouri Laws (1915), p. 267; Nebraska Laws (1913), ch. 104; New York Laws (1915), ch. 569; North Carolina Pub. Laws (1915), ch. 218; North Dakota Laws (1913), ch. 3; Ohio Laws (1913), p. 43; Acts of Third Philippine Legislature, special session (1914), No. 2333; Rhode Island Laws (1914), ch. 1073; Utah Laws (1913), ch. 22; Washington Laws (1913), ch. 34; West Virginia Laws (1915), ch. 43; Wisconsin Laws (1913), ch. 510.

[3] City of Chicago ordinance passed by city council, December, 1913.

[4] California, Henning's Gen. Laws (1914), ch. 453, Act 4040; Connecticut Pub. Acts (1913), ch. 65; Indiana, Burns' Ann. Stats. (1914), sec. 2500d; Maryland Laws (1914), ch. 410; Massachusetts Laws (1914), ch. 288; Montana Laws (1915), ch. 117; Oregon Laws (1909), ch. 104; Pennsylvania Laws (1913), Act. No. 8; South Dakota Laws (1913), ch. 15.

are limited to false statements concerning particular facts in relation to goods offered for sale, as follows:

California.—Concerning the quantity, the quality, the value, the price, the method of production or manufacture, or the fixing of the price of his, its, or their merchandise or professional work; or the manner or source of purchase of such merchandise, or the possession of awards, prizes or distinctions; or the motive or purpose of a sale, intended to have the appearance of an advantageous offer.

Connecticut.—Concerning the nature, quality, method of production or manufacture, or cost of any goods or merchandise offered for sale.

Indiana, Massachusetts, and South Dakota.—Concerning the quantity, the quality, the method of production or manufacture, the cost of production, the cost to the advertiser, the present or former price, or the reason for the price of the merchandise * * *; the manner or source of purchase of such merchandise, or the possession of rewards, prizes or distinctions conferred on account of such merchandise, which statement or assertion has the appearance of an offer advantageous to the purchaser.

Maryland.—Concerning the quality, the quantity, the value, the method of production or manufacture, or the reason for the price of his or their merchandise, or the manner or source of purchase of such merchandise or the possession of awards, prizes, or distinction conferring a gain of such merchandise, or the motive or purpose of a sale, intended to give the appearance of an offer advantageous to the purchaser.

Montana.—Regarding the quality or price.

Oregon.—Concerning the quantity, the quality, the value, the price, the method of producing or manufacture of his merchandise or professional work, or the manner or source of purchase of such merchandise, or the motive or purpose of any sale which is untrue or calculated to mislead.

Pennsylvania.—Concerning the quantity, the quality, the value, the merit, the use, the present or former price, the cost, the reason for the price, or the motive or purpose of a sale, of any merchandise, securities, or service; or concerning the method or cost of production or manufacture of such merchandise; or the possession of rewards, prizes, or distinctions conferred on account of such merchandise; or the manner or source of purchase of such merchandise or securities.

The statutes of the above States vary with respect to the place or method of publication of the statements as follows:

California.—In the newspapers or other periodicals or in public advertisements, or in any communications intended for a large number of persons.

Connecticut.—In a newspaper or circular, or on any card, sign, billboard, label, or other advertising medium.

Indiana, Massachusetts, and South Dakota.—"In a newspaper, circular, form letter or other publication published, distributed or circulated," or "on any billboard, sign, card, label or other advertising medium displayed on, in or near a street, electric car, showcase, store or other place." Massachusetts omits the word "form" before "letter."

Maryland.—In a newspaper, circular, or circular or form letter or other publication.

Montana.—In any advertisement, circular, letter, poster, handbill, display card, or other written or printed matter.

Oregon.—In a newspaper or other periodical, or in public advertisement, or by letter or circular.

Pennsylvania.—In a newspaper, periodical, form letter, or other publication, published, distributed, or circulated.

The law applies to merchandise, securities, or services in Pennsylvania; to goods, wares, or merchandise in Montana; to merchandise or professional work in California and Oregon; and to merchandise only in Connecticut, Indiana, Maryland, Massachusetts, and South Dakota.

An Illinois statute prohibits any advertisement, through the medium of newspapers, signs, placards, handbills, circulars or pamphlets, by which any goods are falsely represented to be stocks damaged by fire, water, or otherwise, or to be bankrupt or insolvent stocks, or to be sheriff's, constable's, receiver's, assignee's, or other judicial sales, or closing out or sacrifice sales, if the goods are represented to be of greater value than the price at which they are offered for sale.[1]

Iowa, in addition to the general statute already noted, has a law[2] applying to transient merchants, which, in effect, provides that no person shall advertise, represent, or hold out that any sale of goods, wares, or merchandise is an insurance, bankrupt, railway wreck, insolvent, assignee, trustee, executor, administrator, receiver, syndicate, wholesale, manufacturer, or closing-out sale, or a sale of goods, wares, or merchandise damaged by smoke, fire, water or otherwise, unless he has filed with the proper officer a statement setting forth the names of the persons from whom the articles were obtained, the date of delivery to him, the place from which said goods were last taken, and all details necessary to fully identify the articles. A number of other States[3] have similar laws relating to transient merchants, although not all require the filing of such a detailed statement.

FALSE OR MISLEADING ADVERTISEMENTS OF NEWSPAPERS RESPECTING THEIR CIRCULATION.—Four States and Porto Rico make it a criminal offense for the publishers of newspapers or periodicals to misrepresent the circulation of their publications for the purpose of securing advertising or other patronage.[4] The text of the New York law is as follows:

> Every proprietor or publisher of any newspaper or periodical who shall wilfully or knowingly misrepresent the circulation of such newspaper or periodical for the purpose of securing advertising or other patronage shall be deemed guilty of a misdemeanor.

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[1] Illinois Stats., Ann. (J. and A.) 1913, secs. 3649, 3650.

[2] Iowa Laws (1913), ch. 62, sec. 4.

[3] Connecticut Gen. Stats. (1902), sec. 4665; Delaware Laws (1895), ch. 71; Illinois Laws (1911), p. 291; Indiana, Burns' Ann. Stats. (1914), sec. 8237; Kentucky, Carroll's Stats. (1915), sec. 4217a; Maine Rev. Stats., ch. 45, sec. 10; Massachusetts Rev. Laws (1902), ch. 65, sec. 8; Maryland Code, art. 27, sec. 174; Michigan, Howell's Stats. (1913), secs. 5304–5306; Minnesota Gen. Stats. (1913), sec. 6100; New Hampshire Laws (1897), ch. 46; New Jersey Comp. Stats., p. 2942; New York Consol. Laws, ch. 24, sec. 85; North Dakota Comp. Laws (1913), secs. 3037, 3038; Ohio Gen. Code (1910), sec. 6357; Pennsylvania Laws (1913), Act 161; Rhode Island Gen. Laws (1909), ch. 192; Wisconsin Stats. (1913), secs. 1584 (a), (b); and Wyoming Laws (1915), ch. 68.

[4] Colorado Laws (1911), ch. 178; Kansas Gen. Stats. (1909), sec. 2851; New York Consol. Laws, Penal Law, sec. 946; Porto Rico Rev. Stats. (1911), sec. 5931; Rhode Island Gen. Laws (1909), ch. 349, sec. 43.

In one instance, in addition to the criminal penalty imposed for "any false affidavit in regard to circulation," it is provided that if any false or fraudulent representation that the circulation is greater than the actual paid circulation is made to an advertiser the latter may recover the sum paid for advertising;[1] and in another the advertiser may recover the amount paid in excess of what the charge would have been based on the actual circulation.[2]

In at least three States there is a statute prohibiting the editor or proprietor of any newspaper from publishing in such paper "as true, any statement which he has not good reason to believe to be true, with intent to increase thereby the sales of copies of such paper."[3]

Section 10. Misbranding or falsely marking goods.

GENERAL STATEMENT.—There are a number of State statutes which prohibit the false marking of manufactured articles or other goods, or require that such articles, which include in some instances products of the soil, shall be marked in such manner that the purchaser may be correctly advised as to their quantity, quality, ingredients, or place of manufacture. In most instances, the primary object of these statutes is unquestionably to prevent the purchasing public from being deceived respecting goods or products offered for sale. Some of these laws are general in their character, prohibiting misrepresentation by false marking or branding respecting certain attributes of any goods offered for sale, or requiring that their quantity, number, or ingredients be marked on wrappings or containers. Others prohibit such misrepresentation, or require the marking only of certain kinds or classes of goods specified in the act. In some instances, the laws are restricted in their application to marks on containers or labels, in others they apparently apply to any false branding. Very generally, misrepresentation of this character is prohibited when done with intent to defraud or deceive the public. In some cases public officials are required to mark goods with their weight, measure, quantity or ingredients, and the alteration or imitation of such marks is prohibited.

STATUTES APPLYING TO ALL GOODS.—A number of States prohibit the false marking of any goods with respect to some one or more of the following: Kind, number, quantity, weight, measure, quality, grade, or place of manufacture or production.[4]

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[1] Kansas Gen. Stats. (1909), secs. 2851, 2852.

[2] Colorado Laws (1911), ch. 178.

[3] North Dakota Comp. Laws (1913), sec. 9788; Oklahoma Rev. Laws (1910), sec. 2542; South Dakota Penal Code (1903), sec. 487.

[4] New York Cons. Laws (1909), ch. 40, secs. 435, 2416, 2354, subsec. 5, as amended by laws, 1914, ch. 332, p. 931; Pennsylvania Laws (1913), No. 445; Tennessee Acts (1909), ch. 548; Iowa Code (1897), secs. 4871, 5048.

A Kentucky law is more general, apparently prohibiting the use of a false brand of any description.[1]

Falsely altering or imitating the mark of any public officer denoting quality, weight, or quantity is also prohibited in some instances.[2] A number of the States also prohibit the marking of false weight or tare,[3] and several affirmatively require goods to be marked with the weight, or measure, or numerical contents,[4] or that the gross, tare, and net weights shall be shown.[5] Others do not specifically require that the goods shall be marked, but provide that if so marked the markings shall be accurate.[6]

In a number of States the sealer of weights and measures, or a similar officer, is authorized to test the weight or measure of merchandise sold to determine the accuracy of representations or marks respecting weight or quantity.[7] It is likewise a common prohibition that foreign substances or inferior goods shall not be placed in packages of merchandise with intent to defraud. Some of these statutes are apparently of general application while others cover only specified commodities such as cotton, tobacco, hay, and straw.[8]

STATUTES APPLYING TO PARTICULAR ARTICLES OR COMMODITIES.—The false marking of gold and silverware or articles plated with the precious metals has been the subject of frequent legislation. A number of States prohibit the marking of articles as gold or gold alloy, or silver, sterling silver, coin or coin silver, unless they are of the fineness prescribed in the acts, and forbid the use of the mark "sterling" or "coin" on silver-plated ware. They also require that where any

[1] Kentucky Stats. (1915), secs. 1280, 1280a.

[2] Iowa Code (1897), sec. 5046; Massachusetts Rev. Laws (1902), ch. 56, sec. 2; Tennessee Code (1896), secs. 6736, (1) and (2).

[3] California Penal Code, sec. 554; Idaho Rev. Code (1908), secs. 1544, 7108; Idaho Laws (1913), ch. 84, sec. 22; Montana Rev. Code (1907), sec. 8702; New Jersey Laws (1911), ch. 201, sec. 28; New Mexico Laws (1913), ch. 82, sec. 31; North Dakota Comp. Laws (1913), sec. 9988; Oklahoma Rev. Laws (1910), sec. 2741; South Dakota Penal Code, sec. 664.

[4] Montana Laws (1913), ch. 83, sec 12; Nevada Rev. Laws (1912), sec. 4809; Pennsylvania Laws (1913), No. 445; Utah Laws (1915), ch. 104, sec. 21; Wyoming Comp. Stats. (1910), sec. 3061.

[5] Nebraska Rev. Stats. (1913), secs. 8885–8887; Ohio Gen. Code (1910), sec. 13128.

[6] Arkansas Acts (1913), No. 252.

[7] Arizona Rev. Stats. (1913), Civil Code, sec. 5516; California, Henning's Gen. Laws (1914), ch. 600, act 5556, sec. 29; Connecticut Pub. Acts (1911), ch. 280, sec. 5; Illinois Laws (1913), p. 614; Louisiana Acts (1912), Act No. 146, sec. 9; Maine P. L. (1913), ch. 116, sec. 6; Michigan Pub. Acts (1913), No. 168, sec. 5; Montana Laws (1913), ch. 83, sec. 10; Nevada Rev. Laws (1912), sec. 4815; Utah Laws (1915), ch. 104, sec. 8; Vermont Laws (1912), No. 175, sec. 3; Washington Laws (1913), ch. 52, sec. 4.

[8] Alabama Code (1907), sec. 6683; Arizona Rev. Stats. (1913), Penal Code, sec. 388; California Penal Code, sec. 381; Florida Comp. Laws (1914), sec. 3703; Georgia, Park's Ann. Penal Code (1914), sec. 709; Montana Revised Codes (1907), sec. 8489; New Mexico Laws (1913), ch. 82, sec. 28; New York Cons. Laws (1909), ch. 40, sec. 434; North Dakota Comp. Laws (1913), sec. 9764; Oklahoma Rev. Laws (1910), sec. 2693; Pennsylvania P. & L. Digest (1700–1907), col. 7467, sec. 97; Rhode Island Gen. Laws (1909), ch. 179; South Carolina Crim. Code, sec. 453; South Dakota Penal Code, sec. 466; Tennessee Code (1896), secs. 6740–6742; Texas Rev. Crim. Stats. (1911), Arts. 965, 966; Washington Laws (1909), ch. 249, sec. 366; Wyoming Comp. Stats. (1910), sec. 6000.

marks are used on gold-plated articles to indicate the fineness of the plate, the fact that the articles are only plated shall also be clearly shown. The statutes vary in the scope of their application, some covering gold and silver, and gold and silver plated ware, others not applying to plated ware, and still others covering only articles made of silver.[1]

Considerable legislation of a similar nature respecting other articles or commodities has been enacted. Several States provide for the inspection of lumber, and, in some instances, of lumber products, such as shingles, staves, hoops, and clapboards, and require variously that when inspected they shall be marked to show the State and county where inspected, the kind and quality of the products or the contents.[2] The false marking of dry goods with respect to quantity or number of yards has also been prohibited,[3] and in one instance it is provided that when the contents of this class of goods in yards or pounds is indicated thereon such marking shall be accurate, and in case of error the seller or manufacturer shall be liable to the purchaser for double the amount of the deficiency.[4] Several States require the contents in yards to be marked on sewing thread,[5] and in one State the number of yards or the weight is required to be marked on other threads as well, such as darning, crocheting, and embroidery thread.[6] Some of these statutes impose a penalty for omitting to mark the thread as required or for falsely marking it. Cotton duck or canvas, and articles other than wearing apparel made of this material, are sometimes required to be marked with the accurate weight per yard of material, together with a description of the filler. A misrepresentation or concealment as to these requirements or with respect to the dimensions of certain specified articles made of canvas is prohibited.[7] The use of the words "linen," "pure linen," or "all linen" on collars and cuffs has, in one instance, been prohibited

[1] Colorado, Mills' Ann. Stats. (1912), secs. 1998–2002; Iowa Gen. Acts (1911), ch. 181; Laws of Maryland (1912), ch. 639, p. 941; Minnesota Gen. Stats. (1913), secs. 8864–8869; North Carolina Pub. Laws (1907), ch. 331; New Jersey Comp. Stats., pp. 1806–1809; Rhode Island Gen. Laws (1909), ch. 199; Wisconsin Stats. (1913), secs. 4432–1 to 8; Massachusetts Suppl. Rev. Laws (1902–1908), p. 1431; Connecticut Gen. Stats., Rev. of 1902, secs. 1380–1384; Illinois Rev. Stats., ch. 38, secs. 531–533; New York Cons. Laws (1909), ch. 40, secs. 422–429; Pennsylvania, P. & L. Digest (1700–1907), cols. 2341–43, secs. 171–176; Comp. Laws of Utah (1907), secs. 4487x 14 to 18; Virginia Code (1904), sec. 3722a; Laws of Washington (1909), ch. 249, secs. 428–433; Arkansas Acts (1895), Act 116; Florida Comp. Laws (1914), secs. 3351, 3352; Maine Rev. Stats. (1903), ch. 127, sec. 12; Michigan, Howell's Stats. (1913), secs. 4303, 4304; Missouri Rev. Stats. (1909), secs. 4882, 4883; New Hampshire P. S., ch. 126, p. 397; Ohio Gen. Code (1910), secs. 13112, 13113; South Carolina Cr. Code (1912), sec. 510.

[2] Iowa Code (1897), sec. 3032; New Hampshire P. S. (1901), ch. 128, p. 403; Maine Rev. Stats. (1903), ch. 42, secs. 14–22.

[3] Laws of Maryland (1914), ch. 802, sec. 26; Utah Laws (1915), ch. 104, sec. 22.

[4] Pennsylvania, P. & L. Digest (1700–1907), col. 7453.

[5] Connecticut Gen. Stats. (1902), sec. 4885; Massachusetts Rev. Laws (1902), ch. 57, secs. 61–64; New Jersey Comp. Stats. (1910), p. 5395; New York Cons. Laws (1909), ch. 20, sec. 394; Rhode Island Gen. Laws (1909), ch. 167.

[6] New York Cons. Laws (1909), ch. 20, sec. 394.

[7] Minnesota Gen. Stats. (1913), secs. 3772 to 3778; Wisconsin Stats. (1913), sec. 1670t.

unless the materials used contain one ply having a flax thread in both warp and filling.[1] One State prohibits the sale of boots and shoes made in whole or in part of imitation leather unless the articles bear the name of the manufacturer and place of manufacture, the substitute used, and in what part of the article used.[2] In another State the law requires these articles, when made in whole or in part of imitation leather, to be marked with the words "imitation leather."[3] The laws of other States provide that the manufacturers of these goods shall have the exclusive right of stamping their name and place of manufacture on them, that the goods shall not be merchantable unless so stamped, or that such stamp shall be deemed a warranty that the merchandise is of good material and well manufactured.[4] It is a somewhat common requirement also that mattresses or stuffed furniture, and in some instances lounges, sofas, pillows, cushions, down quilts, or comforts containing down, hair or feathers shall be marked in such manner as to show the materials of which they are composed, the percentage of each, their kind, quality, and quantity, and in particular whether they are new or second-hand.[5] Occasionally these requirements apply only to mattresses made of second-hand material.[6] There is little uniformity in the requirements, but some of those enumerated above appear in all the statutes. The use of the word "felt," or words of like import, unless the materials of which the mattresses are composed have been felted, is prohibited, as is also removing, defacing, or concealing the marks.

Somewhat extensive legislation has been enacted regarding the marking or branding of paints, linseed oil, and turpentine. A number of the States have one or more of the following requirements respecting paints; viz, that they shall bear the name and address of the manufacturer or distributor, the name, the quantity, the percentage of each ingredient, or each mineral constituent, the names of oils substituted for linseed oil, and the percentage of such substitute or the net measure or weight.[7] Any marks tending to deceive the purchaser as to the nature or composition of paint are sometimes prohibited.[8] Requirements of similar general character respecting

[1] New York Cons. Laws (1909), ch. 40, sec. 430.

[2] Louisiana Acts (1912), Act No. 179.

[3] Michigan, Howell's Stats. (1913), sec. 4312.

[4] Massachusetts Rev. Laws (1902), ch. 72; Maine Rev. Stats. (1903), ch. 40, sec. 17.

[5] Indiana, Burns' Ann. Stats. (1914), secs. 7648q–7648z; Maryland, Bagby's Ann. Code (1910), art. 43, secs. 51, 52; Minnesota Gen. Stats. (1913), secs. 3779–3782; New Jersey Laws (1912), ch. 171; New York Laws (1913), ch. 503; Ohio Laws (1911), p. 519; Pennsylvania Laws (1913), No. 90; Wisconsin Rev. Stats. (1913), sec. 1418s.

[6] California, Henning's Gen. Laws (1914), ch. 309, Act 2682.

[7] North Dakota Comp. Laws (1913), sec. 2923; Ohio Gen. Code (1910), secs. 6331–6334, 13168; Iowa Code, Suppl. (1907), secs. 2510a to d; Minnesota Gen. Stats. (1913), secs. 3734 to 3742; Nebraska Rev. Stats. (1913), secs. 5759–5766; South Dakota Laws (1907), ch. 196; Vermont Laws (1908), No. 123.

[8] Massachusetts, Suppl. to Rev. Laws (1902–8), p. 539; Minnesota Gen. Stats. (1913), sec. 3741; Nebraska Rev. Stats. (1913), sec. 5759; Ohio Gen. Code (1910), secs. 6331, 13168.

linseed oil and turpentine are found in a number of States.[1] In particular, adulterations, substitutions or imitations of these commodities are required to be clearly marked, and, in some instances, with the name and percentage of each ingredient.[2] The sale of substitutes or adulterations is sometimes prohibited entirely.[3]

Other commodities, the subject of legislation prohibiting misbranding or requiring that containers, wrappings, labels, etc., shall be properly marked, are lime,[4] cotton,[5] hay and straw,[6] tobacco,[7] mill products,[8] explosives,[9] matches,[10] automobile tires,[11] binder twine,[12]

[1] Florida Comp. Laws (1914), sec. 3802; Georgia Pol. Code, secs, 1839–1841; Indiana, Burns' Ann. Stats. (1914), secs. 9664–9668; Iowa G. A. (1911), chs. 110–111; Kansas Laws (1911), ch. 179; Kentucky Stats. (1915), sec. 1373; Massachusetts, Suppl. Rev. Laws (1902–8), p. 539; Michigan Pub. Acts (1909), No. 110, Pub. Acts (1911), No. 175; Minnesota Gen. Laws (1913), sec. 3733; Nebraska Rev. Stats. (1913), sec. 5763; New Jersey Comp. Stats. (1910), p. 2595; New York Cons. Laws (1909), ch. 1, secs. 240–243, as amended by Laws (1911), ch. 816; North Dakota Comp. Laws (1913), secs. 2875, 2876; Ohio Gen. Code (1910), secs. 6331 to 6334, 12792, 12793, 13168; Pennsylvania Laws (1913), No. 82; South Carolina Civil Code (1912), secs. 2401–2405; South Dakota Laws (1909), ch. 20, and Laws (1911), ch. 191; Vermont Laws (1908), No. 123; Wisconsin Stats. (1913), sec. 1636-*l*.

[2] Connecticut Pub. Acts (1911), ch. 274; Georgia, Park's Ann. Code (1914), Vol. I. secs. 1821–1824, 1839, and Vol. II, secs. 650–656; Florida Comp. Laws (1914), secs. 3801–3808; Iowa G. A. (1911), chs. 110–111; Kansas Laws (1911), ch. 179; Massachusetts Acts (1911), ch. 266; Michigan Pub. Acts (1909), No. 110, Pub. Acts (1911), No. 175; Nebraska Rev. Stats (1913), sec. 5763; Ohio Gen. Code (1910), secs. 6331–6334, 13168; Pennsylvania Laws (1913), No. 82; South Dakota Laws (1909), ch. 20, and Laws (1911), ch. 191; Vermont Laws (1908), No. 123; Wisconsin Stats. (1913), sec. 1636-*l*.

[3] Indiana, Burns' Ann. Stats. (1914), secs. 9664–9668.

[4] Maine Laws (1913), ch. 164; Maryland Ann. Code, art. 48, sec. 89; Kansas Laws (1913), ch. 334; Massachusetts Rev. Laws (1902), ch. 57, secs. 47 to 53; New Jersey Laws (1913), ch. 178; Ohio Laws (1913), p. 151; Rhode Island Gen. Laws (1909), ch. 159; Vermont Pub. Stats. (1906), secs. 4918 to 4920; Virginia Code Ann., Suppl. (1910), p. 883.

[5] New Hampshire Pub. Stats. (1901), p. 394, secs. 17 to 19; Rhode Island Gen. Laws (1909), ch. 166; Texas Gen. Laws (1911), ch. 34.

[6] Kansas Laws (1913), ch. 334; Massachusetts Rev. Laws (1902), ch. 57, secs. 35–39; New Hampshire Pub. Stats. (1901), ch. 126, sec. 4; New Jersey Comp. Stats. (1910), p. 1806; New York Cons. Laws (1909), ch. 20, sec. 255, ch. 40, sec. 2417, and Laws of 1913, ch. 96; Pennsylvania, P. & L. Digest (1700–1907), col. 7466, sec. 93; Rhode Island Gen. Laws (1909), ch. 179.

[7] Missouri Rev. Stats. (1909), secs. 6861–6870; Virginia Code (1904), secs. 1803, 1806, 1807, 1833; Indiana, Burns' Ann. Stats. (1914), sec. 7925.

[8] Alabama Laws (1911), p. 104; Arkansas Acts (1911), No. 161; Florida Comp. Laws (1914), sec. 1143u; Illinois, J. & A. Ann. Stats., sec. 10786; Indiana, Burns' Stats. (1914), sec. 7940; Iowa Code Suppl., secs. 5077-a, 5077-6; Kansas Laws (1913), ch. 188, as amended by Laws 1915; Kentucky, Carroll's Stats. (1915), ch. 46a; Louisiana Acts (1914), No. 25; Maine Laws (1911), ch. 119, sec. 4; Massachusetts Suppl. to Rev. Laws (1902–1908), p. 531; Michigan, Howell's Stats. (1913), sec. 2661; Minnesota Gen. Stats. (1913), secs. 3706–3710; Mississippi Laws (1912), ch. 139, sec. 2; Missouri Stats., secs. 8501–8506; Nebraska Laws (1915), ch. 192; New Mexico Laws (1913), ch. 82, sec. 30; North Carolina Laws (1909), ch. 149; North Dakota Comp. Laws (1913), sec. 2911; Ohio Gen. Code (1910), sec. 1129; Pennsylvania, P. & L. Digest, col. 265, sec. 138; Rhode Island Pub. Laws (1910), ch. 182; South Carolina Civil Code (1912), sec. 2420; Texas Rev. Civ. Stats. (1911), sec. 5894; Vermont Pub. Acts (1912), No. 183; Virginia Acts (1910), ch. 151, sec. 6; Washington, Remington and Ballinger's Code (1910), sec. 6013; Wisconsin Stats. (1913), sec. 5548g-*l*.

[9] Colorado, Mills' Ann. Stats. (1912), sec. 5925; Connecticut Pub. Stats. (1902), sec. 2623; Idaho Rev. Codes (1908), secs. 1555–1557; Massachusetts Rev. Laws (1902), ch. 57, secs. 32–34; Michigan, Howell's Stats. (1913), secs. 4257–4262; Utah Comp. Laws (1907), secs. 4280x, 3 to 5.

[10] Louisiana Acts (1912), Act No. 137; Minnesota Gen. Stats. (1913), secs. 5162–5165; Wisconsin Stats. (1913), sec. 1636b.

[11] Minnesota Gen. Stats. (1913), secs. 2647, 2648.

[12] Michigan Pub. Acts (1909), No. 55; Iowa Code Suppl. (1907), secs. 5077-a25; Nebraska Rev. Stats. (1913), secs. 590, 591; Ohio Gen. Code (1910), sec. 13165.

leather,[1] scythe stones,[2] calcium carbide,[3] chain cables,[4] nails or brads,[5] and plastering hair.[6]

Section 11. Conducting business under an assumed or fictitious name.

A number of States make it an offense for any person or persons to transact business within the State under any assumed name, or under any designation or name, corporate or otherwise, other than the real name or names of the individuals conducting the business, unless such person or persons record in the clerk's office of the town or city wherein the principal place of business is located, a return setting forth the name under which such business is conducted, a brief description of the business, and the names and residences of all persons doing business under the assumed name. In Vermont it is expressly provided that the laws shall apply to corporations doing business under any name other than that of the corporation, and the Massachusetts act provides that the law shall not apply to any corporation doing business under its true corporate name.

A portion of the Vermont law is as follows:

SEC. 1. A person doing business in this State on the first day of April, 1909, under any name other than his own, and every copartnership or association of individuals except corporations doing business in this State on said last named date under any name which does not contain the surnames of all copartners or members thereof without any other descriptive or designating words except the Christian names or initials of such copartners or members, shall on or before the first day of June, 1909, cause to be recorded in the clerk's office in the town or city wherein the principal place of business of such person, copartnership or association is located, a return setting forth the name under which such business is carried on, the name of the town or city wherein such place of business is located, a brief description of the kind of business to be transacted under said name, and the individual names and residences of all persons, copartners or members so doing business thereunder; and shall on or before said last named date file with the commissioner of state taxes a like return. The aforesaid return shall be subscribed and sworn to by one or more of the persons so doing business.

SEC. 2. A corporation doing business in this State under any name other than that of the corporation shall be subject to all the provisions of this Act. * * *[7]

While the primary object of statutes of this character is probably to make it possible to secure service of process on the persons conducting a business under a company name, it appears possible that the use of a "bogus independent" company by a corporation or firm as

[1] New Hampshire Pub. Stats. (1901), ch. 126, sec. 12; Maine Rev. Stats. (1903), ch. 40, sec. 17; Massachusetts Rev. Laws (1902), ch. 59; Rhode Island Gen. Laws (1909), ch. 158.
[2] Rhode Island Gen. Laws (1909), ch. 163.
[3] Iowa Laws (1913), ch. 200.
[4] Rhode Island Gen. Laws (1909), ch. 168.
[5] Massachusetts Rev. Laws (1902), ch. 57, secs. 56–59.
[6] Kansas Laws (1913), ch. 334.
[7] Laws of 1908, No. 117.

a method of competition, might be punished or restrained in the event that they neglected or refused to make the proper return to the clerk's office which would disclose the control of the company employing a fictitious name.

Laws having the same objects and in some respects similar in verbiage are in force in several other States.[1] In Arizona, Montana, North Dakota, Ohio, Oklahoma, and South Dakota the law applies only to partnerships. Two sections of the Rhode Island law are as follows:

SEC. 1. No person or persons shall hereafter carry on or conduct or transact business in this State under any assumed name, or under any designation, name, or style, corporate or otherwise, other than the real name or names of the individual or individuals conducting or transacting such business, unless such person or persons shall file, in the office of the town or city clerk in the town or city in which such person or persons conduct or transact, or intend to conduct or transact, such business, a certificate setting forth the name under which such business is, or is to be, conducted or transacted, and the true or real full name or names, both Christian and surname, of the person or persons conducting or transacting the same, with the postoffice address or addresses of said person or persons. Said certificate shall be executed and duly acknowledged before some person authorized to administer oaths by the person or persons so conducting or intending to conduct such business.

SEC. 4. This Act shall in no way affect or apply to any corporation duly organized under the laws of this State, or to any corporation organized under the laws of any other State and lawfully doing business in this State, nor shall this act be deemed or construed to prevent the lawful use of a partnership name or designation, provided that such partnership name or designation shall include the true and real surname of at least one such person transacting such business.

It will be observed that this statute expressly provides that it shall in no way affect or apply to corporations. A similar provision is found in all of these statutes, except those of California and Massachusetts. In Delaware, Indiana, Kentucky, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, Rhode Island, and Utah, a violation of these statutes is punishable as a misdemeanor; in Vermont, the chancery courts are authorized to restrain violations of the law, while in Arizona, California, Minnesota, Montana, North Dakota, Ohio, Oklahoma, South Dakota, Vermont, and Washington the offending parties are deprived of the right to enforce their contracts in the State courts.

[1] Arizona Rev. Stats., secs. 4350–4355; California Laws (1911), ch. 262, 263; Delaware Laws (1909), ch 146; Indiana, Burns' Ann. Stats. (1914), secs. 9711a–9711c; Kentucky, Carroll's Stats. (1915), sec. 199b; Massachusetts Supp. to Rev. Laws (1902–1908), ch. 72; Michigan, Howell's Stats., secs. 2626–2630; Minnesota Gen. Stats. (1913), secs. 6107–6113; Montana Rev. Codes, secs. 5504–5509; New Jersey Comp. Stats., p. 3686; New York Penal Law, sec. 440; Nevada Rev. Laws, secs. 6728–6731; North Dakota Comp. Laws (1913), secs. 6426–6429; Ohio Gen. Code, secs. 8099–8105; Oklahoma Rev. Laws, secs. 4469–4474; Rhode Island Laws (1909–10), ch. 538; South Dakota Civil Code, secs. 1762–1767; Utah Laws (1913), ch. 25; Washington, Remington & Ballinger's Code (1910), sec. 8369.

Section 12. Placing handbills, circulars, etc., in newspapers and magazines without the consent of the publisher.

The placing of advertisements in the nature of handbills, circulars, cards, etc., in a newspaper or magazine, without the consent of the publisher, has been made a criminal offense in New York, New Jersey, and Pennsylvania.[1] Such advertisements are frequently inserted between the leaves. The New York statute provides as follows:

> Any person who, with intent to profit, directly or indirectly thereby, places or causes or produces an advertisement to be placed in or affixes or causes the same to be affixed to a newspaper without the consent of the publisher of said newspaper, or who directly or indirectly places or causes or procures an advertisement to be placed in, or affixes or causes the same to be affixed to a magazine or periodical without the consent of the publisher of such magazine or periodical, and in a way calculated to lead the readers thereof to believe that such advertisement was circulated by such publisher, is guilty of a misdemeanor.
>
> The placing of an advertisement, notice, circular, pamphlet, card, handbill, printed notice of any kind in, or the affixing thereof to, a newspaper, magazine, or periodical is presumptive evidence that the person or persons or corporation or corporations whose name or names appear therein as proprietor, advertiser, vender, or exhibitor, or whose goods, wares, and merchandise are advertised therein, caused or procured the same to be so placed or affixed with the intent to profit thereby.

[1] New York Laws (1914), ch. 113; New Jersey Laws (1913), ch. 322; Pennsylvania Laws (1913), Act No. 312. See Collins v. American News Co. et al., p. 458.

CHAPTER X.

UNFAIR COMPETITION IN FOREIGN COUNTRIES.

Section 1. Introductory.

The term "unfair competition" as known in the laws and jurisprudence of the United States finds its counterpart in most European countries and has also been the subject matter of treaty among various nations, including the United States.

The terms used for unfair competition are found in the judicial decisions rather than in the statutes. They are generally similar, and in many countries are described by phrases having the same Latin derivation, represented by the French term "concurrence déloyale," or disloyal competition. Countries which do not use this term, but one substantially similar to it (e. g., "unlauterer Wettbewerb" in Germany and "oneerlijke concurrentie" in the Netherlands), recognize in the French phrase, nevertheless, an equivalent meaning. This fact has facilitated international agreements on this subject. In some countries a distinction is made between disloyal competition and illegal competition (concurrence illicite), though both would, apparently, be covered by the phrase "unfair competition."

The primary idea of unfair competition as developed in judicial decisions in European countries is "passing off" or "confusion," but several other distinct kinds of acts are included therein, such as disparagement of competitors, etc. While the fundamental principles of the law of unfair competition in European countries have been developed without special reference to practices to suppress competition generally or to maintain monopoly, the latter idea is found in certain English colonies.

The present discussion aims to set forth as clearly as practicable in brief space not only the meaning and legal application of the term "unfair competition" in foreign countries, but also any legislation or judicial decisions to prevent that which under any other name has apparently been treated as unfair competition. It should be clearly understood, however, that no conclusion is drawn therefrom as to the meaning of this term in the laws of the United States.

CHARACTER OF THE LAW.—The law regarding unfair competition in most European countries is to be found both in the civil and penal codes and in particular statutes. The civil-code provisions on this subject contain brief statements of legal principles without use of the term unfair competition, from which the courts, in several countries

at least, have developed an elaborate jurisprudence under this title. The particular statutes have been enacted regarding specific forms of unfair competition, also without designating them as such, but in some countries the effort has been made to combine in a single statute the chief provisions of this sort, either with or without this specific title.

The present tendency of the law seems to be to combine these two methods of preventing unfair competition, i. e., to have a broad general provision of the civil law applicable to the ever-varying forms of unfair competitive practices, and to supplement this by special provisions making unlawful the more easily defined or more obnoxious unfair practices and sometimes imposing penalties. Especially where international treaties are concerned, or where reciprocity provisions regarding the protection granted to foreigners are incorporated in the statutes, the prohibition by statute of specific acts of unfair competition seems to have certain advantages.

FORMS OF UNFAIR COMPETITION.—The European civil-code provisions, some of which are of recent and some of comparatively early date, generally establish civil liability for unjustifiable injury or for injury by an act which is against good morals (contra bonos mores). These have been given a broad application with reference to unfair practices by competitors, such as misappropriation of firm names, false designation of provenance or quality of goods, disparagement of competitors, enticing employees to leave, etc. Almost all recognized methods of unfair competition have been attacked under such general code provisions.

European penal-code provisions on this subject sometimes specifically prohibit similar practices.

The provisions of earlier special statutes, furthermore, generally relate particularly to the misappropriation of firm names, false designation of provenance of goods, unauthorized use of trade-marks, or of awards at expositions, etc. Violation of such statutory provisions is often made a criminal offense as well as a ground for civil damages. It should be noted that these laws relate particularly to commercial good will or, according to the usual descriptive phrase of this special subject, they relate to "industrial property."

More recent legislation relating to unfair or unlawful methods of competition embraces prohibitions regarding other matters, and especially with respect to false advertisements, bogus clearance sales, espionage, corruption of employees, betrayal of business secrets, rebating, trading stamps, and, in certain British colonies, to practices of a recognized monopolistic tendency, such as combinations of competitors, exclusive dealing, tying contracts, dumping, etc.

BASIC LEGAL IDEAS.—From an historical point of view, and, broadly speaking, unfair competition in European countries relates to unfair

practices to injure a competitor. The effect on the consumer is not generally considered except as it concerns a competitor. Thus, deception practiced on a consumer in regard to the identity of a company or of the origin or provenance of the goods it sells is not an offense because the consumer may be injured, but because an unfair advantage has been taken of a competitor or his special property rights have been invaded.

Various other laws are found which aim to protect the purchaser by prohibiting the sale of deleterious articles or cheating with regard to weights, measures, etc. Especially in recent years laws against such cheating have sometimes been incorporated with laws dealing with unfair competition in the original sense so that it is now more difficult to draw the line between them. It indicates perhaps a broadening tendency with respect to the proof of an unfair act of competition or with respect to the parties who are protected against unfair acts. One explanation or the other is necessary, apparently, if unity of principle is to exist. Thus, injury to the consumer by certain unfair methods of commercial dealing might be regarded as conclusive evidence of the existence of unfair competition without inquiry as to its actual effect on competitors. On the other hand, certain commercial practices which are injurious to the consumer might be defined as unfair competition in every case whether used by all competitors or by a monopoly and without respect to actual or presumed effects on competitors. This, of course, would involve a change in the original principle.

This point of view seems especially important in connection with certain monopolistic practices. Such practices might obviously injure competitors, but where all competitors combine the persons injured would not be actual competitors, but consumers, employees, persons who sell to the combination or the traders who buy from it. So far as competitors are concerned only potential competitors apparently would be injured. Recent laws in certain British colonies apparently are based on the principle that certain monopolistic practices injurious to consumers, employees, noncompeting traders, and potential competitors are unfair methods of competition. It is noteworthy that precisely in these countries both the legal institutions and the political and social conceptions are most nearly like those in the United States.

METHOD OF PRESENTATION.—The law regarding unfair competition has been developed chiefly during the last hundred years, and is of considerable extent and complexity. In some countries the judicial decisions are very numerous. It was not practicable for the Bureau to make an exhaustive investigation into this subject, as not all of the sources of legal information were available. It is thought, however, that a fairly comprehensive view is given of the most pertinent parts

of the codes and statutes. Many judicial decisions have been used for illustration. On some topics, at least, for some countries, many similar cases might be cited, especially with relation to questions of confusion. On other topics, which are perhaps of more peculiar interest in this connection, only a few cases have been found, and sometimes none at all. There is doubtless a considerable number of practices which the courts have declared to be unfair competition, particularly under code provisions, that it would be desirable to notice in this connection, but which the necessarily limited research of the Bureau has not discovered. The laws and judicial decisions are described for each country separately, generally on the basis of an examination of the original texts. The works of legal writers have been largely used as guides, however, and sometimes even the texts of laws and judicial decisions have been derived from them. By following as closely as possible the original material, and treating different countries separately, it is thought that the risk of inaccurate statement is very much less than it would be if the material were rearranged in a comparative form. Such treatment would also involve to a much greater extent conclusions as to the similarity or dissimilarity of laws, for which no conclusive legal authority could be cited and with respect to which the Bureau does not deem it desirable to give its own opinion. The comparative form of treatment, moreover, would give an impression of completeness of statement with regard to the existence or absence of particular rules of law in each country greater than is furnished by the present discussion.

COUNTRIES CONSIDERED.—The countries which are considered in this chapter are as follows: England and its principal colonies and dependencies (including Canada, Australia, New Zealand, South Africa, India, and Egypt), France, Belgium, Italy, Spain, Portugal, the Netherlands, Germany, Austria, Switzerland, Denmark, Norway, Sweden, Russia, Greece, Bulgaria, Roumania, Turkey, Brazil, Argentina, Chile, Peru, and Japan. France and Germany are treated in more detail than any of the others, because they are the best representatives of the two principal methods of legislating against unfair competition and each has an especially well-developed jurisprudence on this subject. The most recent legislation of special interest is that of Greece, Denmark, and certain Swiss Cantons.

GENERAL COMPARISON OF EUROPEAN SYSTEMS OF LAW.—Two distinct systems, the French and the German, have been followed more or less closely by the other countries of continental Europe. The German, or casuistic system, is the more rigid. It provides a special law against specific kinds of unfair competition which contains also a provision of general application. In a general way it has served as a type for the legislation of Austria, Denmark, Greece, Spain, Portugal, and certain Swiss Cantons. The French method is more flexible.

On the basis of certain articles of the Civil Code a far-sighted and extensive system of jurisprudence has been developed by the French courts, which has been followed, more or less closely, by Belgium, Holland, Italy, and the Swiss federal court at Lausanne.

Two fundamentally different views also underlie the German and the French conceptions of what constitutes the essence of unfair competition. According to the theory of French jurists,[1] the relations between a business man and his customers constitute a commercial property right, or good will, known as "achalandage," and whoever knowingly injures it commits an unlawful act and makes himself liable for damages. A violation of such a right constitutes unfair competition (concurrence déloyale) if it involves intent, and unlawful competition (concurrence illicite) if it involves negligence.[2]

According to the view largely prevalent among German jurists unfair competition (unlauterer Wettbewerb) constitutes a violation of the rights which every individual has to his physical and intellectual property, the so-called "Persönlichkeitsrecht."[3]

An important point as to which the German and the French views concerning unfair competition coincide is that the deciding and controlling viewpoint for legislative suppression of unfair competition is not the protection of the public or consumers, but the protection of fellow tradesmen or competitors.[4]

INTERNATIONAL LAW.—The final section of this chapter deals with international treaties respecting unfair competition and various efforts to develop a common international law on this subject. The principal aim of such treaties and the international propaganda referred to, is the protection of the names of commercial concerns, trade-marks, designations of provenance, etc.—in other words, the protection of "industrial property."

Section 2. England and Colonies.

The English common-law decisions respecting unfair or unlawful methods of competition, and a limited number of colonial cases have been considered with American cases of this character in Chapter VII. The English decisions are discussed there in order to show in one place the common law on the subjects treated, the decisions of the English and American courts being usually grounded on the same legal principles. In this section therefore statutory provisions only will be considered. The subjects covered are bribery of employees; exclusive contracts; intimidation by threats of infringement suits; trading-stamp laws; misbranding or falsely marking goods; false or misleading advertisements; and dumping. The provisions of the

[1] Rosenthal, in "Handwörterbuch d. Staatswissenschaften," 3d ed., vol. 8, p. 793.
[2] Lobe, "Die Bekämpfung d. unlauteren Wettbewerbs," 1907, I, p. 80.
[3] Josef Kohler, "Der Unlautere Wettbewerb," 1914, p. 17 fol.
[4] C. Weiss, "Gesetz gegen d. unlauteren Wettbewerb," 1910, p. 3 fol.

Australian Industries Preservation Act respecting unfair competition, while among the most important in this section, are considered separately for the reason that the act is somewhat long and intricate, and does not readily lend itself to a topical treatment. The laws regarding unfair competition in Egypt, which was recently declared a dependency of England, are also treated separately, since the jurisprudence of that country has had an independent development.

BRIBERY OF EMPLOYEES.—In 1898 a special committee of the London Chamber of Commerce (representing 20 trade sections of that organization) made an investigation to determine the prevalence of the practice of paying secret commissions and bribes in the various trades and submitted an exhaustive report from which the following is an excerpt:

> Your committee conclude from the evidence before them that secret commissions in various forms are prevalent in almost all trades and professions to a great extent, and that in some trades the practice has increased, and is increasing, and they are of opinion that the practice is producing great evil, alike to the morals of the commercial community and to the profits of honest traders.
>
> Bribes in all forms, including secret commissions, owe their existence sometimes to the desire of the donor to obtain the assistance of the donee; sometimes to the demand expressed or implied of the donee that the bribe shall be given.
>
> In the first class of cases your committee have reason to believe that the bribe is often given unwillingly and with a pang of conscience, as the result of the keen competition in trade, and in the fear, too often well founded, that unless given other less scrupulous rivals will obtain an advantage; many cases have come before your committee in which traders have believed (often, though not perhaps always, without reason) that their entire failure to obtain orders has been due to the want of a bribe.
>
> The second class of cases are those in which the recipient extorts the bribe from those who have established business relations with his principal. This practice is rendered more effective and oppressive by a combination between the blackmailers. The servant or agent who demands a commission and fails to receive it, not infrequently warns his fellows in the same position in the trade against the honest trader, who thus finds himself shut out from dealings with a whole circle of firms.[1]

In 1899 Lord Russell of Killowen, then Lord Chief Justice, introduced a bill which he had drafted in conjunction with Sir Edward Fry, the object of which was "to check, by making them criminal, a large number of inequitable and illegal secret payments, all of which are dishonest, and tend to shake confidence between man and man, and to discourage honest trade and enterprise."[2] The bill was not passed, but an act having a similar object was assented to in 1906. This act provides that it shall be a misdemeanor, punishable by imprisonment

[1] London Chamber of Commerce, Annual Report, 1898, p. 117; Great Britain, Parliamentary Debates, Apr. 20, 1899, pp. 14–15.

[2] Great Britain, Parliamentary Debates, 4th series, vol. 70 (1899), pp. 14, 21.

with or without hard labor, for not exceeding two years, or by a fine not exceeding £500, or both—

If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having after the passing of this act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favor or disfavor to any person in relation to his principal's affairs or business; or

If any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favor or disfavor to any person in relation to his principal's affairs or business; or

If any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested and which contains any statement which is false or erroneous or defective in any material particular and which to his knowledge is intended to mislead the principal.[1]

Prosecutions for offenses under this act may not be instituted without the consent in England of the attorney general or solicitor general, and in Ireland of the attorney general or solicitor general for Ireland.[2]

This law checks not only the practice of bribing buyers or other employees for the purpose of obtaining orders, but the bribery of employees to induce the disclosure of confidential information respecting their employers' business. Shortly before the act became effective the Secret Commissions and Bribery Prevention League[3] was organized for the purpose, among other things, of creating public opinion adverse to corrupt trading in any form, of publishing literature, including the setting forth of the results of trials and convictions under the prevention of corruption act, and of inquiring into cases involving the payment of secret commissions, blackmail, bribery or corruption, and initiating prosecutions under the act. The membership of this organization includes leading commercial firms, and a number of trade associations are affiliated with it. Since this law became effective there have been some 130 prosecutions, of which 87 have resulted in conviction. Of these, 12 involved the disclosure of confidential information.

[1] The Prevention of Corruption Act, 6 Edw. VII, ch. 34.

[2] An unsuccessful attempt to repeal this provision was made in 1912. It has been urged, on the one hand, that it diminishes the possibility of blackmail, and, on the other, that it seriously interferes with the successful operation of the act. Sir Edward Fry expressed the belief that "attempts to put the act in force should be relieved from the burden of two trials, the one in camera before the law officer of the Crown and the other before the justices, with the possibility of a committal to the assizes. The necessity of putting evidence before the law officer increases the expense and also causes delay, which in this case is especially serious."

[3] Compare Verein gegen das Bestechungsunwesen in Germany, see p. 636.

The following references to convictions under this law have been selected from "The War Against Bribery,"[1] Crew on Secret Commissions and Bribes,[2] and a publication of the Secret Commissions and Bribery Prevention League:[3]

The managing director of a London printing company was in the habit of paying a secret commission to a clerk employed by the Gramophone & Typewriter Co. (Ltd.), whose monthly account for printing averaged at the time upward of £100. The clerk took the printing from one firm and gave it to the company whose principal bribed him, and it was stated that the Gramophone & Typewriter Co. effected a saving by the change. The clerk himself received some £40. When the case came before the magistrate at Old Street Police Court the magistrate pointed out that the payments to the clerk were fraudulent before the passing of the act, and he expressed his regret that he was compelled to impose so very inadequate a penalty. He fined the printer the maximum, £50, with £10 10s. costs, and ordered the clerk to pay £50 and £2 2s. costs.

The secretary of a boot manufacturing company in the country for attempting to bribe the manager of the boot department of some stores in London with a view to obtaining orders was fined £10 and £5 5s. costs.

A commercial traveler at Leicester employed by soap manufacturers sent 10s. 6d. to an employee at [certain] dye works. He was fined £20 and £5 5s., court costs and witnesses' costs.

At the central criminal court a blouse manufacturer (female) was indicted for offering as an inducement to obtain work a share of profits to the employees of a firm of drapers. She was released on entering into recognizances to come up for judgment if called upon.[4]

The managing director of a chemical manufacturing company in Switzerland sought to obtain secrets in connection with the manufacture of silica, offering bribes to the employees of a British company engaged in the industry. He was sentenced to six months' hard labor, and a friend who aided him and one of his commercial travelers were also sent to prison—the former for four months and the latter for one month, hard labor being ordered in each case. The trial took place at Newcastle Assizes, and both the longer sentences were appealed against unsuccessfully.[5] The appellants were also further convicted on an additional charge of corruptly offering employment to an agent of the Thermal Syndicate, in order to induce him to disclose the method of manufacturing silica employed by his principals. The appeal was brought before the lord chief justice, Mr. Justice Bray, and Mr. Justice Coleridge. In affirming the judgment the court said in part:

"Mr. Justice Horridge directed the jury quite correctly on the law; he told them they could not convict if the alleged bribes were given simply to induce the men to leave their present employment and enter the service of the applicant, Huessener, or his company, Silicaware (Ltd.), who were rivals of the Thermal Syndicate (Ltd.), but they must convict if they are satisfied that the bribes were given to induce the men to disclose their master's secret methods of manufacturing silica and the names of the persons supplying molds to them. He also pointed out, and quite correctly, that if the jury were satisfied that the bribes were given for the above-mentioned purpose they were bound to convict,

[1] By R. M. Leonard, London, 1913, pp. 39–40.
[2] London, 1913, pp. 91–93.
[3] News Sheet No. 34, Nov., 1914.
[4] Rex v. Walz, C. C. C., 621.
[5] Appeal of Huessener and Schroeder, 6 Cr. App. Rep., 173.

even if they were also satisfied that the applicants wished in addition to secure the services of these men for their company at Zurich."

A young German was charged at Manchester with giving money to the employees of some textile printers and velvet embossers carrying on business at Leeds, in order to discover a secret process of printing velvet. He was fined £50 and costs, in addition to £100 which he offered as compensation to the Leeds company.

A chemical worker was fined at Northwich £20 or two months' imprisonment for offering bribes to obtain trade secrets and drawings of apparatus. For receiving stolen documents he was also fined £5 or one month's imprisonment.

At Reading a quantity clerk formerly employed by a firm of boiler setters asked a contractor employed by the firm for information as to any new trade inquiries made by his former employers, so that he also might tender in competition for the work. A fine of £5 and £5 costs was imposed.

At Hull a commercial traveler was fined £10 for offering bribes to a boy to give him confidential information about his employer's business.

A youth employed by a clean-towel company for promising to pay boys for a list of the customers of a rival company was found by the magistrate at Westminster to have committed a breach of the act. He was ordered to pay £2 2s. costs.

A bottle manufacturer at London for offering a clerk in the bottle trade a bribe (£5) for information concerning his employer's business was fined £20 and £10 10s. costs.

An emigration agent at Liverpool for attempting to bribe (offering £2 to £25) a ship's doctor to pass unhealthy emigrants was fined £50 and one month's imprisonment, to be followed by deportation, and £10 10s. or three months' additional imprisonment.

A motor agent at London for offering "compensation" to the motor expert of a soap manufacturing firm, in order to obtain a contract for lorries, was fined £15 and £5 5s. costs.

A timber merchant at Nuneaton for sending £1 to an agent of a colliery company as an inducement to measure poles wrongly was fined £50.

An act of the Canadian Parliament assented to May 19, 1909,[1] prohibits the giving or offering of bribes and the giving or using of false or misleading documents. This act is substantially similar to the English statute previously discussed. It is, however, unnecessary to obtain the consent of the attorney general before instituting a prosecution.[2]

Legislation prohibiting the giving or offering of bribes, and the giving or using of false or misleading receipts or other documents,

[1] 8–9 Edw. VII, ch. 33.

[2] In The King *v.* Vici, 18 Canadian Crim. Cases, 51 (1911), the defendant was charged with having received a secret commission of $5,000 as a reward for undertaking to make a favorable report respecting certain mining lands. In the language of the court, "the accused was employed for a fixed sum, namely, $400, to do certain intellectual work—the examination of mining lands. That is an independent contract—a hiring of personal services, and nothing more. He was then neither the 'agent' nor the 'employee' * * * within the meaning of the act." The defendant was discharged.

See also Winnipeg Steel Granary & Culvert Co. (Ltd.) *v.* Canada Ingot Iron Culvert Co. (Ltd.) et al., 7 Dominion Law Reps., 707 (Manitoba Ct. of Appeals, 1912).

has been passed by the Commonwealth of Australia and four of the Australian States.[1]

Although more elaborate than the English Prevention of Corruption Act,[2] these statutes were intended to accomplish the same results. The passage of these laws was largely due to the disclosures of the Royal Commission on the Butter Industry, which reported, among other things, that the practice of making secret payments prevailed to an alarming extent in the dairying industry, and that "the business of traders and agents who have withstood the solicitations for commissions has consequently suffered from such refusal to make secret payments."[3] In urging the passage of the Commonwealth bill the attorney general expressed the belief that the majority of agents adhered rigidly to the honest course, but these, he stated, "had to submit to the result which followed their adherence to that course, because there were others less scrupulous, who did not hesitate to do what the courts, as well as common sense and moral sense, designate as unfair, unjust, and improper."[4]

An act for the prohibition of secret commissions, passed by the General Assembly of New Zealand in December, 1910,[5] is substantially similar to the Australian statutes referred to above. Briefly, it prohibits gifts to an agent without the consent of the principal, requires agents to disclose any pecuniary interest they may have in contracts made on behalf of their principal, penalizes the giving of false receipts, invoices, etc., to agents, the delivery of such false documents to the principal, and provides for the punishment of

[1] Commonwealth Act No. 10 of 1905; Victoria, 5 Edw. VII, No. 1974. In Rex *v.* Scott (1907), Victorian Law Reps., 471, the defendant, a paint manufacturer, was convicted of having corruptly given money to an employee of the Melbourne Hospital in charge of certain painting for the purpose of influencing the latter to show favor to the defendant in connection with the purchase of material. The representative of another paint manufacturer was accused of a similar offense and acquitted. (Rex *v.* Stevenson (1907), Victorian Law Reps., 475); Western Australia, 5 Edw. VII, No. 13; Tasmania, 6 Edw. VII, No. 21; South Australia, 1 Geo. V, No. 1006.

[2] See p. 535.

[3] Report of Royal Commission on the Butter Industry, Australian (Commonwealth), Parliamentary Papers, 1905, vol. II, p. 1219, 1250.

[4] Australian (Commonwealth) Parliamentary Debates, 1905, vol. XXV, p. 494, 495.

At a conference of Federal and State ministers, held at Hobart in February, 1905, it was resolved "that each State government bring in a bill dealing with secret commissions, and that the premier of Victoria be asked to draft such a bill." At the premiers' conference at Brisbane in June, 1907, it was resolved "that those States which have not yet passed legislation on the lines of the Victorian secret commissions act be urged to do so without any undue delay." (See South Australian Debates, 1909, Legislative Council, p. 64; ib., 1910, p. 336; House of Assembly, 1910, p. 400.)

For additional information respecting the prevalence and effect of these practices, see Australian (Commonwealth) Parliamentary Debates, vol. XXV, p. 494 et seq.; Report of Royal Commission on the Butter Industry, Australian (Commonwealth) Parliamentary Papers, session 1905, vol. II, p. 1225; Western Australia, Parliamentary Debates, 1905, vol. XXVIII (n. s.), pp. 256, 608; New Zealand, Parliamentary Debates, vol. 153, p. 452; South Australia, Parliamentary Debates, Legislative Council, 1909, p. 64; ib., 1910, p. 336; House of Assembly, 1910, p. 400; Canada, Debates of the House of Commons, 1909, pp. 1484, 1490.

[5] Act No. 40, of 1910.

those aiding and abetting offenses against the act. Except as expressly provided for by the act, proof of custom is no defense. As in England and the Australian States, no prosecution for an offense against the act may be commenced without the consent of the attorney general.

Similar legislation has been enacted in the Isle of Man[1] and Sierra Leone.[2]

EXCLUSIVE CONTRACTS (TYING CLAUSES).—In 1907 the English Parliament passed the Patents and Designs (amendment) Act and for the first time made unlawful certain restrictions attached to the sale, lease, or use of patented articles or processes, declaring them to be in restraint of trade and contrary to public policy. The act provides in part as follows:[3]

It shall not be lawful in any contract made after the passing of this act in relation to the sale or lease of, or license to use or work, any article or process protected by a patent to insert a condition the effect of which will be—

(*a*) To prohibit or restrict the purchaser, lessee, or licensee from using any article or class of articles, whether patented or not, or any patented process, supplied or owned by any person other than the seller, lessor, or licensor, or his nominees; or

(*b*) To require the purchaser, lessee, or licensee to acquire from the seller, lessor, or licensor, or his nominees, any article or class of articles not protected by the patent;

and any such condition shall be null and void, as being in restraint of trade and contrary to public policy: *Provided*, That this subsection shall not apply if—

(*i*) The seller, lessor, or licensor proves that at the time the contract was entered into the purchaser, lessee, or licensee had the option of purchasing the article or obtaining a lease or license on reasonable terms without such conditions as aforesaid; and

(*ii*) The contract entitles the purchaser, lessee, or licensee to relieve himself of his liability to observe any such condition on giving the other party three months notice in writing and on payment in compensation for such relief in the case of a purchase of such sum, or in the case of a lease or license of such rent or royalty for the residue of the term of the contract, as may be fixed by an arbitrator appointed by the Board of Trade.

* * * * * * *

The insertion by the patentee in a contract, made after the passing of this act of any condition which by virtue of this section is null and void shall be available as a defense to an action for infringement of the patent to which the contract relates, brought while that contract is in force.

Nothing in this section shall—

(*a*) Affect any condition in a contract whereby a person is prohibited from selling any goods other than those of a particular person; or

(*b*) Be construed as validating any contract which would, apart from this section, be invalid; or

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[1] Apr. 14, 1908.

[2] Ordinance No. 11, of 1907.

[3] Patents and Designs (amendment) Act, 1907, ch. 28, sec. 24 (1), (4), (5); and see ch. 29, sec. 38 (1), (4), (5).

(*c*) Affect any right of determining a contract or condition in a contract exercisable independently of this section; or

(*d*) Affect any condition in a contract for the lease of or license to use a patented article, whereby the lessor or licensor reserves to himself or his nominees the right to supply such new parts of the patented article as may be required to put or keep it in repair.

With minor changes, these provisions were adopted in Australia.[1] The objectionable conditions, however, were not declared to be in restraint of trade. The Australian patents act provides also that any person may, after the expiration of two years from the granting of a patent, present a petition alleging that the reasonable requirements of the public with respect to the invention have not been satisfied and praying for the grant of a compulsory license or, in the alternative, for the revocation of the patent. The reasonable requirements of the public are not deemed to have been satisfied if, among other things, by reason of the default of the patentee "to grant licenses on reasonable terms; any existing trade or industry, or the establishment of any new trade or industry, in Australia is unfairly prejudiced;" or, "if any trade or industry in Australia is unfairly prejudiced by the conditions attached by the patentee * * * to the purchase, hire, or use of the patented article, or to the using or working of the patented process."[2]

Other provisions relating to exclusive dealing are contained in the Australian Industries Preservation Act, which is separately considered below.[3] (See p. 551.)

In 1911 New Zealand adopted legislation similar to the English patent act quoted above, and, unlike Australia, retained the declaration that such conditions are in restraint of trade and contrary to public policy.[4]

In Canada an act to amend the inland revenue act[5] provides that the license of any manufacturer of goods subject to a duty of excise may be revoked by the Minister of Inland Revenue if the licensee—

(1) Makes a sale of such goods, or consigns them for sale upon commission, subject to the condition that the purchaser or consignee

[1] Commonwealth Acts, 1909, The Patents Act, Pt. V, sec. 87b (1), (5), (6).

[2] Ib., sec. 87 (1), (6). See p. 247.

[3] In Victoria the minister of mines in December, 1913, introduced a bill which provided, among other things, that any person who conspires or agrees to refuse to sell goods for cash to any other person, either absolutely or except upon disadvantageous and oppressive terms or conditions, shall be guilty of a misdemeanor. It was further provided that "the terms and conditions upon which goods are sold or offered for sale or attempted to be sold shall be deemed to be disadvantageous and oppressive when either expressly or by implication they provide that the buyer of any goods referred to or specified in the schedule to this act shall not buy such goods from any other person or class of persons than the seller of such goods or from persons or classes of persons indicated by the said seller." The consideration of this bill was postponed. Victoria, Parliamentary Debates, session 1913–14, pp. 3349, 3350, 3887.

[4] New Zealand Stats., 1911, Act No. 17, sec. 40 (1), (4), (5).

[5] Act of Aug. 10, 1904. See p. 240.

shall not sell or deal in similar goods produced by or obtained from any other manufacturer or dealer; or

(2) Makes a sale of such goods, or consigns them for sale upon commission, to another person upon such terms as would in their application give more profit to the purchaser or consignee if he should not sell or deal in goods of a like kind produced by or obtained from any other manufacturer or dealer.

The decision of the minister of inland revenue is final as to the facts in the case. Distillers, rectifiers, compounders, brewers or malsters, manufacturers of tobacco or cigars, or bonded manufacturers are subject to license.

This act was passed as a result of an investigation by a royal commission appointed for the purpose of inquiring into an exclusive contract system alleged to be then employed by the American Tobacco Co. of Canada and the Empire Tobacco Co. (Ltd.). It was charged that the object and effect of the system was to prevent those who dealt in goods made by these companies from selling those of other manufacturers, thus creating a monopoly. The commission reported that such a contract system existed in the cigarette and tobacco trade in Canada; that such contracts were not illegal either under the common law or any then existing statutes, and that other manufacturers were at a disadvantage as a result.[1]

The Canadian Combines Investigation Act has been described in Chapter V.[2] Although not specifically prohibiting contracts for exclusive dealing, it may be noted that a board, appointed under the authority of that act to investigate the United Shoe Machinery Co. of Canada, after considering the form of certain leases adopted by that company and the effect of tying clauses contained therein, arrived at the conclusion that:

> The United Shoe Machinery Co. of Canada is a combine and by the operation of the clauses of the leases, quoted in the foregoing, which restrict the use of the leased machines in the way therein set forth, competition in the manufacture, production, purchase, sale, and supply of shoe machinery in Canada has been and is unduly restricted and prevented.[3]

The Commercial Trusts Act of New Zealand, which has been described in Chapter V,[4] forbids certain forms of rebating in consideration of exclusive dealing. Perhaps the most striking provision of this act, however, is that which also makes illegal, under certain con-

[1] See Proceedings of the House of Commons, Apr. 12, 1910, session 1909–10, vol. IV, column 6853.

[2] See p. 241.

[3] In re N. Drouin et al. and The United Shoe Machinery Co. of Canada, The Canada Gazette, Oct. 26, 1912, pp. 1319, 1323.

[4] See p. 251.

ditions, the refusal to deal with another. These provisions are found in sections 3 and 4, the language of which is as follows:

3. Every person commits an offense who, either as principal or agent, in respect of dealings in any goods, gives, offers, or agrees to give to any other person any rebate, refund, discount, concession, allowance, reward, or other valuable consideration for the reason or upon the express or implied condition that the latter person—

(*a*) Deals or has dealt or will deal, or intends or undertakes or has undertaken or will undertake to deal, exclusively or principally, or to such an extent as amounts to exclusive or principal dealing, with any person or class of persons, either in relation to any particular goods or generally; or

(*b*) Does not deal or has not dealt or will not deal, or intends or undertakes or has undertaken or will undertake not to deal, with any person or class of persons, either in relation to any particular goods or generally; or

(*c*) Restricts or has restricted or will restrict, or intends or undertakes or has undertaken or will undertake to restrict, his dealing with any person or class of persons, either in relation to any particular goods or generally; or

(*d*) Is or becomes or has been, or has undertaken or will undertake to become, a member of a commercial trust; or

(*e*) Acts or has acted or will act, or intends or undertakes or has undertaken or will undertake to act, in obedience to or in conformity with the determinations, directions, suggestions, or requests of any commercial trust with respect to the sale, purchase, or supply of any goods.

4. Every person commits an offense who, either as principal or agent, refuses either absolutely or except upon disadvantageous or relatively disadvantageous conditions, to sell or supply to any other person, or to purchase from any other person, any goods for the reason that the latter person—

(*a*) Deals or has dealt or will deal, or intends to deal, or has not undertaken or will not undertake not to deal, with any person or class of persons, either in relation to any particular goods or generally; or

(*b*) Is not or has not been, or will not become or undertake to become or has not undertaken to become, a member of a commercial trust; or

(*c*) Does not act or has not acted or will not act, or does not intend to act, or has not undertaken or will not undertake to act, in obedience to or in conformity with the determinations, directions, suggestions, or requests of any commercial trust with respect to the sale, purchase, or supply of any goods.

It should be noted that this act applies only to certain classes of goods.[1] The reason assigned by the Prime Minister for limiting the operation of this act to the articles mentioned was that it was desired to interfere as little as possible with trade generally, and if the act were made one of general application a modification of the drastic provisions would be necessary.[2]

In 1911 the governor general of the Union of South Africa was authorized by law to enter into ocean-mail contracts, but it was provided that he should not enter into any such contract with any person who "gives, offers, or promises to any person any rebate, refund,

[1] Agricultural implements, coal, meat, fish, flour, oatmeal, and the other products or by-products of the milling of wheat or oats, petroleum or other mineral oil (including kerosene, naphtha, and the other products or by-products of any such oil), sugar, and tobacco (including cigars and cigarettes).

[2] New Zealand Parliamentary Debates, Oct. 20, 1910, vol. 152, p. 656.

discount, or reward upon condition that such person shall ship, or in consideration of such person having shipped, goods by vessels of particular lines to the exclusion of any others.[1]

INTIMIDATION BY THREATS OF INFRINGEMENT SUITS.—The English Patents, Designs, and Trade-Marks Act of 1883 provides for the recovery of damages from a patentee who circulates threats of infringement suits, unless he prove that there has been an actual infringement or, with due diligence, commence and prosecute an action to determine the question of infringement. The text of the provision as slightly changed in 1907 is as follows:

> Where any person claiming to be the patentee of an invention, by circulars, advertisements, or otherwise, threatens any other person with any legal proceedings or liability in respect of any alleged infringement of the patent, any person aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as he has sustained thereby, if the alleged infringement to which the threats related was not, in fact, an infringement of any legal rights of the person making such threats:
>
> Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent.[2]

A defendant sued under this statute has two defenses, viz: (1) That he had a valid patent which was, in fact, infringed by the plaintiff; that is, that the statements respecting infringement were true; (2) that he instituted and prosecuted with due diligence a suit to test the question of infringement. The prevalence in England of this method of competition is shown by the large number of actions that have been brought under this statute.[3] The statutory remedy is cumulative and the injured party may, in the same proceeding, claim

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[1] Union of South Africa, Post Office Administration and Shipping Combinations Discouragement Act, 1911, sec. 6. See p. 254.

On February 27, 1912, in the House of Assembly of the Union of South Africa, the minister of commerce and industries was asked whether it was the intention of the Government to make the regulations framed under this act "apply to persons or companies giving deferred rebates on articles of commerce to the exclusion of competitive articles, such, for instance, as the Nestlé Co. on their milk, the Vacuum Oil Co. on the Standard Oil Co.'s paraffin, and other companies on different articles of necessity"; and if not, whether the Government was prepared to bring in a bill "to make unlawful such practice as being in restraint of trade on the lines of like legislation in the United States, Australia, New Zealand, and other countries." In reply it was stated that it was not possible to make such regulations applicable to the cases mentioned, and the Government was not at that time prepared to introduce legislation on the lines indicated. On Mar. 12, 1912, "a bill to prohibit the giving of rebates and secret commissions in mercantile transactions" was introduced. This bill provided in part that it shall not be lawful for any person "to give, offer, or promise, whether acting as principal or agent, to any other person any rebate, refund, discount, or reward upon condition that such other person shall purchase or otherwise obtain, or in consideration of such other person having purchased or otherwise obtained, goods, wares, or merchandise from any particular person to the exclusion of any other persons." This bill was not passed. (House of Assembly Debates, 1912, pp. 703, 1054–55, Gazette Extraordinary, vol. VI, No. 214, Mar. 20, 1912, p. lxi.)

[2] 46 and 47 Victoria, ch. 57, sec. 32, and 7 Edw. VII, ch. 29, sec. 36.

[3] The cases down to 1912 are collected, and the construction of the statute briefly set forth in 22 Halsbury's Laws of England, 227, 228.

under the statute and under the common law, the latter claim being based on the malicious injury to his business by the circulation of threats where there was clearly no foundation for the charge of infringement.[1]

The Canadian patent act does not contain any provision similar to section 32 of the English Patents, Designs, and Trade-Marks Act of 1883. The only remedy, therefore, for threats of suit for infringement is such as could be had under the English common law.[2] The Australian and New Zealand laws contain provisions practically identical with section 36 of the English law of 1907.[3]

LEGISLATION AFFECTING THE USE OF TRADING STAMPS.—Although the trading-stamp system has been in extensive operation in Great Britain, no legislation affecting it has been enacted, though in 1912 the Admiralty forbade the sale by canteens of any kind of goods with which prize coupons are given.[4]

Several of the British colonies have enacted laws prohibiting in some instances and in others regulating the issuance or use of trading stamps. Somewhat lengthy parliamentary debates attended the enactment of this legislation. The advocates of the measures urged that the sale of such stamps to merchants by trading-stamp companies, which subsequently redeemed them, tended to create monopolies and to restrain trade by restricting the use of the stamps to particular traders; that it was an unfair method of competition, and that it diverted business from its accustomed channels. They further urged that it was neither a desirable nor a fair method of advertising and not a satisfactory method of giving discounts. On the other hand, the opponents of the legislation urged that the system afforded a novel method of advertising at a low cost, particularly adapted to small traders, and an effective means of giving discounts

[1] Dredge *v.* Parnell, 13 R. P. C., 392 (1896); Lycett Saddle, etc., Co. *v.* Brooks & Co., 21 R. P. C., 656 (1904); Alfred Appleby's Twin Roller Chain (Ltd.) *v.* Albert Eadie Chain (Ltd.), 16 R. P. C., 318 (1899).

[2] Audette's Practice of the Exchequer Court, p. 508.

[3] Australia Commonwealth Acts, 1909, Act No. 17, sec. 16; New Zealand Stats., 2 Geo. V, No. 17, sec. 38.

For substantially similar legislation, see also Leeward Islands, patents act, 1906, sec. 34; India, patents and designs act, 1911, sec. 36; Barbadoes, patents act, 1903, sec. 35; Transvaal, patents proclamation No. 22, 1902, sec. 48; Southern Rhodesia, patents ordinance, 1904, sec. 49; Gold Coast Colony, patents ordinance, 1900 (as amended in 1902 and 1903), sec. 35; Seychelles Islands, patents ordinance, 1901, sec. 36; Mauritius, patents (amendment) and designs ordinance, 1913, sec. 15; British Central Africa Protectorate, patents, designs, and trade-marks ordinance, 1903; Gambia, patents ordinance, 1900 (as amended, 1904), sec. 36; Northern Nigeria, patents proclamation, 1902, sec. 35; Ceylon, patents ordinance, 1906, sec. 37; Hongkong, patents ordinance, 1892, sec. 5; Uganda Protectorate, African order in council, 1889, art. 55; Nyasaland, patents, designs, and trade-marks ordinance, 1903; the China, Japan, and Korea order in council, 1899; the Siam order in council, 1899; Falkland Islands, patents ordinance, 1903; Gibraltar order in council, 1884, and patents ordinance, 1913; St. Lucia, patents ordinance, 1899, sec. 38; St. Vincent, patents ordinance, 1898, sec. 37; Grenada, patents ordinance, 1898, sec. 37; British Guiana, patents ordinance, 1902, sec. 34.

[4] Crew on Secret Commissions and Bribes, p. 115n.

on small purchases. They further asserted that it did not tend to monopoly, as any number of trading-stamp companies might enter the business; that, in fact, the stamps furnished an effective weapon with which the small trader could fight his larger competitors, particularly the so-called chain stores; and that the principal opponents of the use of the stamps were the large dealers. Finally, they urged that prohibitive legislation would protect one class against the legitimate competition of another, and that it was not unfair competition to attract trade from a business rival by such methods.

A Canadian statute prohibits the issuance of trading stamps by parties other than merchants or manufacturers,[1] thus, in effect, abolishing trading-stamp companies.[2] The issuer, giver, and receiver of stamps issued in violation of the act are all subject to punishment. An offer by a manufacturer upon a wrapper, box, or receptacle of a premium or reward is exempted from the operation of the statute.

Prior to the passage of the Canadian general law, Ontario and Quebec authorized cities, towns, and villages to forbid the issuance of stamps by trading-stamp companies. By-laws passed under the authority of the Quebec act were declared unconstitutional, but those passed in Ontario were held valid.[3]

The Australian Commonwealth appears not to have passed any law regarding trading stamps, but several of the States have statutes on the subject. Victoria, Tasmania, and Western Australia prohibit the issuance or giving of trading stamps by any stamp company, trader, or other person.[4] In order, however, to provide a ready and simple means by which merchants can give a discount with cash purchases the Tasmanian Government sells discount stamps to business men at their face value and redeems them when presented in quantities aggregating in value not less than 1 shilling. South Australia prohibits the issuance of any trading stamp not "redeemable at the particular shop or warehouse at which the goods in respect of which such stamp was issued were purchased."[5]

New Zealand prohibits the issuing or giving of trading stamps by either trading-stamp companies, tradesmen, or other persons,[6] As in the case of Tasmania, however, the New Zealand Government

[1] Rev. Stat. of Canada, 1906, ch. 146, secs. 335, 505–508.

[2] Similar legislation has been enacted in Jersey. Recueil des Lois, Tome 7 (1907), p. 616.

[3] Senate Debates, Dominion of Canada, session of 1905, pp. 905–912; Ontario Stats., 1 Edw. VII, ch. 26, sec. 26; Quebec Stats. (1903), ch. 39.

[4] Victoria Acts of Parliament, Acts No. 1750 (1901) and No. 1794 (1902); Tasmania Acts of Parliament, Act No. 56 (1900); Western Australia Acts of Parliament, 1st and 2d Edw. VII, 1901–2, pp. 654a–654b.

[5] South Australia, Acts 1904, No. 859.

[6] New Zealand, Cons. Stats., vol. 5, Act No. 197 of 1908, reenactment of Act No. 65 of 1900.

sells discount stamps to tradesmen and redeems them when presented in specified quantities.[1]

CONFUSION OF CORPORATE NAMES.—An English statute prohibits the registration of a company name identical with that of an existing registered company or so nearly resembling it as to be calculated to deceive, unless the company previously registered is being dissolved and signifies its consent to the adoption of the name in such manner as the registrar requires. Provision is made for a change of name in case of the inadvertent registration of a company in contravention of the foregoing enactment.[2]

Substantially similar prohibitions are found in the statutes of the various States of the Australian Commonwealth,[3] though in South Australia and Western Australia no specific provision is made for a change of name in case that of some other corporation is inadvertently adopted. The statutory requirements in New Zealand are similar to those in the Australian States.[4] The Canadian law on this subject is practically the same as the English.[5]

MISBRANDING OR FALSELY MARKING GOODS.—The English Merchandise Marks Act of 1887[6] makes it an offense for any person to apply any false trade description to goods[7] respecting their number, quantity, measure, gauge, or weight, or the place or country of their origin, or the mode of manufacturing or producing them, or the material of which they are composed, or to make any false description, statement, or other indication respecting any goods being the subject of an existing patent, privilege, or copyright. It is a defense to this part of the act, however, if the person accused prove that he

[1] In Bermuda trading stamps issued by parties other than merchants or tradesmen are required to have a redeemable value in money printed thereon, which shall not be less than one-fifth of a penny, and must be redeemed in money when presented in numbers aggregating in face value not less than 3 pence, but it is not required that any trading stamps, the face value of which is a fractional part of a penny, be redeemed. Merchants or tradesmen who redeem their own stamps, and foreign merchants or manufacturers, as well as local merchants or tradesmen who place coupons, etc., in or upon any wrappers or goods which are supplied by them in that condition to others for sale are exempted from the provisions of the act (Bermuda Acts, 1905, Act No. 7). Natal, Union of South Africa, has extended its lottery acts to prohibit the offer of any prize, reward, or gain in connection with the purchase or sale of tobacco or intoxicating liquors (Natal, Acts, 1909, No. 31, sec. 5).

[2] Companies (Consolidation) Act, 1908, sec. 8.

[3] New South Wales, Stats. 1899, No. 40, sec. 234; Queensland Stats., vol. I, p. 148; South Australia Laws, 1892, No. 557, sec. 23; Tasmanian Stats., vol. 1, p. 373; Horwitz's Victorian Stats., vol. I, p. 194; Western Australia Stats., vol. III, p. 29.

[4] New Zealand Cons. Stats., vol. 1, p. 361.

[5] Canada Rev. Stats., 1906, ch. 79, secs. 7a, 21; British Columbia Rev. Stats. (1911), vol. 1, p. 307; Manitoba Rev. Stats. (1913), vol. 1, p. 228; New Brunswick Con. Stats. (1903), vol. I, p. 788; Northwest Territories Ordinances (1911), p. 137; Nova Scotia Stats. (1900), ch. 11, sec. 21; Ontario Rev. Stats., vol. 2, pp. 1867–1868; Quebec Rev. Stats., vol. 2, art. 6015; Saskatchewan Rev. Stats. (1909), p. 735; Yukon Cons. Ordinances (1914), ch. 18, sec. 18.

[6] 50 and 51 Vict., ch. 28; Kerly on Merchandise Marks (Ed. 1909). See also Special Report on Merchandise Marks Act (1862) Amendment Bill (London, 1887); and Annual Report of the Commercial Control Branch of the Board of Agriculture and Fisheries, 1913. [Cd. 7354.]

[7] "Goods" are defined as anything which is the subject of trade, manufacture, or merchandise.

acted without intent to defraud. It is also an offense for any person to sell, expose for sale, or have in his possession for sale or any other purpose of trade or manufacture any goods or things to which any false trade description is applied, unless he proves that, having taken all reasonable precautions, he had no reason to suspect the genuineness of the trade description, and that he gave the prosecutor, on demand, all the information in his power with respect to the persons from whom he obtained the goods, or that otherwise he acted innocently.

The act of 1887 also prohibits any person from falsely representing that any goods are made by a person holding a royal warrant, or for the service of Her Majesty, or any of the royal family, or any other Government department.[1] And in 1905, at the suggestion of the Association of Royal Warrant Holders, it was provided that any person who, without the authority of His Majesty or of a member of the royal family, uses in connection with any business or profession the royal arms in such a manner as to lead others to believe that he is duly authorized to use the same may be restrained by injunction at the suit of any person authorized to use such arms, or is authorized by the Lord Chamberlain to take proceedings in that behalf.[2]

The Canadian Criminal Code[3] prohibits any person from putting a "false trade description" upon any goods or from selling or exposing for sale goods knowing them to be falsely described. The law applies to any materially false description, statement, or other indication, direct or indirect, as to the number, quantity, measure, gauge, or weight of any goods, the place or country in which made or produced, the mode of manufacturing or producing, and the material of which composed, as well as to any goods being the subject of an existing patent, privilege, or copyright. It also forbids the use of any figures, words, or marks to induce persons to believe that the goods are the manufacture or merchandise of some other person, and the use of any false names or initials of any person.

The Commonwealth of Australia and the States of New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia[4] have statutes prohibiting any person from putting any false description upon any goods. These acts are similar to the Canadian law. The Commonwealth and Queensland acts, however, do not include a specific prohibition applying to the use of figures, words, or marks to induce persons to believe that the goods

[1] Ib., sec. 20. See also Patent and Designs Act, 1907, ch. 29, sec. 90.

[2] Trade-Marks Act, 1905, ch. 15, sec. 68. See also Royal Warrant Holders Assn. v. Slade & Co. (Ltd.), 25 R. P. C., 245 (Ch. Div., 1908), and Royal Warrant Holders Assn. v. Kitson, 26 R. P. C., 157 (Ch. Div., 1909).

[3] Rev. Stats. of Canada, 1906, ch. 146, secs. 335–337, 341, 488, 489.

[4] Commerce (Trade Descriptions) Act, 1905, Consol. Laws of Commonwealth of Australia, 1901–1911, vol. II, p. 1031; Stats. of New South Wales, 1900, Act No. 19, secs. 13, 19–21, 31; Queensland Stats., vol. II, p. 1715, trade-marks act, 1864, secs. 13–15 and 26; Acts of Parliament of South Australia, 1892, No. 551; Acts of Parliament of Tasmania, 1893, 57 Vic., No. 6; Horwitz's Vic. Stats., vol. 9, p. 14, 54 Vic., No. 1146; Stats. of Western Australia, 1913, No. 28 (Criminal Code), secs. 496, 497, 499, 501, and 507.

are the manufacture or merchandise of some other person or to the use of any false names or initials of a person. The Commonwealth act applies only to exports and imports, while the State laws apply to merchandise or anything which is the subject of local trade or manufacture.

New Zealand and India have statutes,[1] similar to the Canadian law, prohibiting any person from putting any false description upon any goods. As in Canada, the laws cover the use of any figures, words, or marks to induce persons to believe that the goods are the manufacture or merchandise of some other person and the use of any false names or initials of any person.

Falsely marking gold ware.—By an act passed in England in 1854,[2] it is provided that if any assayer, officer, or employee of any company or corporation authorized to assay and mark gold vessels, plate, or manufactures of gold, shall mark or suffer to be marked any gold vessel, plate, or manufacture of gold of a lower standard with any die or other instrument used by such company or corporation for marking such manufactures of gold of a higher standard, the company shall forfeit a specified sum. It is further provided that any officer or employee convicted of such offense shall be discharged from his office with said corporation and shall thereafter be incapable of holding any office or employment in or under the same or any other such company or corporation. Provision is made, by reference to the act of 7 and 8 Victoria, chapter 22, for the seizure, defacement, and in certain instances the melting of such falsely marked plate, and for the disposition of the proceeds thereof.

Canada's Gold and Silver Marking Act[3] requires, where any mark is used, a registered trade-mark on all plated articles and all flat and hollow ware, and both the trade-mark and a quality mark on all gold and silver articles not stamped under the laws of another Government. Any additional mark not calculated to mislead or deceive may be used except on plated articles. On these the only other marks allowed are an identification number and the name or initials of a dealer. Articles are not to be described as gold or silver unless they are of a fineness required by statute, and the use of any guaranty marks on plated ware as to its durability is prohibited.

Miscellaneous statutes regarding false marking.—There are several special English statutes which prohibit the misbranding or alteration of marks on fabrics and cutlery. The linen trade-marks acts of 1743 and 1744[4] imposed a penalty for the erasure of marks required on Irish linen or for indicating by false marks that other linen is made in Ireland. When made in Ireland by hand loom weavers,

[1] New Zealand Consol. Stats., 1908, vol. IV, No. 140; Indian Merchandise Marks Act, Act IV, 1889.

[2] 17 and 18 Vic. (1854), ch. 96, sec. 5.

[3] Canada, Stats., 1913, ch. 19.

[4] 17 Geo. II, ch. 30; 18 Geo. II, ch. 24, sec. 3.

linen damasks must have woven into the selvage "Irish hand-woven linen damask," and cambric or linen diaper goods must have stamped or printed on it "Irish hand-woven."[1] By the Fabrics (Misdescription) Act of 1913,[2] it is an offense to sell or have in possession for the purpose of sale, any textile fabric or article made thereof, described verbally or otherwise as noninflammable, unless it conforms to certain standards prescribed by regulations. If a defendant under this act shows that such fabric was bought by a person resident within the United Kingdom, who sold under warranty, and that he has taken reasonable steps to ascertain the truth of, and in fact believes, the statement contained in the description, he may lay an information against such person and thus escape the penalty.

An act passed in 1819[3] provides that only articles of cutlery forged or made by means of a hammer may be marked with a hammer.

A Canadian statute requires the number of feet per pound, together with the name of the dealer, to be marked on balls of binder twine, unless manufactured for export only.[4]

The statutes of India provide that piece goods such as are ordinarily sold by length or by the piece shall not be removed from the factory without having the length conspicuously stamped thereon.[5]

The Statutes of Queensland and Western Australia[6] forbid the mixing of uncertified goods with goods which have been marked or certified as to their quality under the authority of any statute.

A South Australian statute[7] prohibits any person from removing or altering or attempting to remove or alter any stamp, stain, brand, or impression on any furniture made in or imported into the State.

Statutes of South Australia and New Zealand[8] forbid any person to manufacture, sell, or expose for sale boots or shoes the soles of which are partly leather or imitation leather without stamping on such soles a statement of the component materials.

FALSE OR MISLEADING ADVERTISEMENTS.—Apparently the only English statute which touches the subject of false or misleading advertisements is the Exhibition Medals Act of 1863.[9] This act forbids any trader to falsely represent that he obtained a medal or certificate from the commissioners for the expositions of 1851 or 1862 in respect of any article or process for which there was an award, or falsely to represent that any other trader has obtained a medal or certificate, knowing such representations to be false, or falsely to represent that

[1] 9 Edw. VII, ch. 21.
[2] 3 and 4 Geo. V, ch. 17.
[3] 59 Geo. III, ch. 7.
[4] Canada, Rev. Stats., 1906, ch. 85, secs. 346–354, as amended; 1914, ch. 10, p. 105.
[5] Indian Merchandise Marks Act, Act IV, 1889, sec. 12.
[6] Queensland Stats., vol. VIII, p. 7010 (Criminal Code, 1899); Western Australia, Stats. 1913, No. 28 (Criminal Code), sec. 549.
[7] South Australia, Acts 1904, No. 856, secs. 2, 3, 9.
[8] South Australia, Acts 1911–12, No. 1046, sec. 4; New Zealand Stats. 1912, No. 43.
[9] 26 and 27 Vic., ch. 119.

any article sold or exposed for sale has been made by, or by any process invented by, a person who has obtained in respect of such article a medal or certificate from the said exhibition commissioners.[1]

DUMPING.—The practice of manufacturers or exporters selling goods abroad at prices lower than the fair market value of such goods when sold for home consumption has been the subject of special legislation in Canada, the Union of South Africa, New Zealand, and Australia. An act passed in Canada in 1904 and amended in 1907, provides in part as follows:

In the case of articles exported to Canada of a class or kind made or produced in Canada, if the export or actual selling price to an importer in Canada is less than the fair market value of the same article when sold for home consumption in the usual and ordinary course in the country whence exported to Canada at the time of its exportation to Canada, there shall, in addition to the duties otherwise established, be levied, collected and paid on such article, on its importation into Canada, a special duty (or dumping duty) equal to the difference between the said selling price of the article for export and the said fair market value thereof for home consumption; and such special duty (or dumping duty) shall be levied, collected and paid on such article, although it is not otherwise dutiable.

Provided that the said special duty shall not exceed 15 per cent ad valorem in any case.[2]

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[1] This act was passed partly as a result of the case of Batty *v.* Hill (1 H. & M. Ch. cases, 264 (1863), see p. 388), in which it was held that an injunction would not lie to restrain a trader from falsely representing that his goods had been awarded a medal at the exposition of 1862, when, in fact, the medal had been awarded another.

[2] Edw. VII, ch. 11, sec. 19; 6–7 Edw. VII, ch. 11, sec. 6.

In addition to the above the act provides as follows:

Provided also that the following goods shall be exempt from such special duty, viz: (a) goods whereon the duties otherwise established are equal to 50 per cent ad valorem; (b) goods of a class subject to excise duty in Canada; (c) sugar refined in the United Kingdom; (d) binder twine or twine for harvest binders manufactured from New Zealand hemp, istle, or tampico fiber, sisal grass, or sunn, or a mixture of any two or more of them, of single ply, and measuring not exceeding 600 feet to the pound.

Provided further that excise duties shall be disregarded in estimating the market value of goods for the purposes of special duty when the goods are entitled to entry under the British preferential tariff.

"Export price" or "selling price" in this section shall be held to mean and include the exporter's price for the goods, exclusive of all charges thereon after their shipment from the place whence exported directly to Canada.

If at any time it appears to the satisfaction of the governor in council, on a report from the minister of customs, that the payment of the special duty by this section provided for is being evaded by the shipment of goods on consignment without sale prior to such shipment, the governor in council may in any case or class of cases authorize such action as is deemed necessary to collect on such goods, or any of them, the same special duty as if the goods had been sold to an importer in Canada prior to their shipment to Canada.

If the full amount of any special duty of customs is not paid on goods imported, the customs entry thereof shall be amended and the deficiency paid upon the demand of the collector of customs.

The minister of customs may make such regulations as are deemed necessary for carrying out the provisions of this section and for the enforcement thereof.

Such regulations may provide for the temporary exemption from special duty of any article or class of articles when it is established to the satisfaction of the minister of customs that such articles are not made or sold in Canada in substantial quantities and offered for sale to all purchasers on equal terms under like conditions, having regard to the custom and usage of trade.

Such regulations may also provide for the exemption from special duty of any article when the difference between the fair market value and the selling price thereof to the importer as aforesaid amounts only to a small percentage of its fair market value.

The Union of South Africa provided for the collection of a dumping duty in 1914. The act provides in part as follows:

In the case of goods imported into the Union of a class or kind made or produced in the Union, if the export or actual selling price to an importer in the Union be less than the true current value (as defined in this Act) of the same goods when sold for home consumption in the usual and ordinary course in the country from which they were exported to the Union at the time of their exportation thereto, there may, in addition to the duties otherwise prescribed, be charged, levied, collected, and paid on those goods on importation into the Union a special customs duty (or dumping duty) equal to the difference between the said selling price of the goods for export and the true current value thereof for home consumption as defined in this Act: *Provided*, That the special customs duty (or dumping duty) shall not in any case exceed fifteen per cent ad valorem.[1]

The act also provides that additional countervailing duties may be collected to offset any bounties granted in the country of origin, that the goods subject to either such dumping or countervailing duty shall be determined by the Governor General, and that notice of such action shall be published in the Gazette.[2]

These acts do not, as in the Australian Industries Preservation Act, expressly declare dumping to be unfair competition. The provisions of the Australian act respecting dumping are considered below. (See p. 555.)

In New Zealand the Agricultural Implement Manufacture, Importation, and Sale Act, 1905, contains certain provisions respecting unfair competition in the sale of agricultural implements. Where complaint is made that competition on "unfair lines" is being carried on by importers of implements from foreign countries, a remedy is provided by law in the form of bonuses to the manufacturers of implements in New Zealand, to be granted upon the recommendation of an administrative board.[3] This act was subsequently consolidated with other laws and constitutes Part I of the Monopoly Prevention Act, 1908.[4]

THE AUSTRALIAN INDUSTRIES PRESERVATION ACT, 1906–1910.—The Australian Industries Preservation Act relates to unfair competition as well as to combinations or trusts. The parts of this law relating to

[1] Union of South Africa, Stats., 1914, Act No. 26, sec. 8 (1).

[2] Ib., sec. 8 (2) and (3).

[3] According to the information available, no bonus was ever granted under this act. In 1908 the minister of trade and customs stated that the board had met but once since it was created. A complaint against an American concern, investigated in 1907, resulted in the board reporting that the complaint was not justified and recommending that no bonus should be granted. (Parliamentary Debates, Oct. 6, 1908, vol. 145, p. 912; Nov. 7, 1912, vol. 161, p. 1380; Reports of the Agricultural Implement Inquiry Board, Oct. 12, 1907. Appendix to Journals of New Zealand House of Representatives, 1907, vol. IV, H. 40.)

[4] It was provided that Part I of the Monopoly Prevention Act should expire by limitation Dec. 31, 1908, but by various amendments it has been continued in force, and in 1913 it was further extended to Dec. 31, 1915 (Act No. 73 of 1913).

unfair competition are considered here, although this necessarily involves some repetition of what has been discussed in connection with trust laws.

The act is divided into three parts, namely, (1) "preliminary," (2) "repression of monopolies," and (3) "prevention of dumping." Unfair competition is dealt with in both the second and third parts. The fact that provisions regarding unfair competition are included with the provisions regarding "repression of monopolies" is itself a significant fact and characteristic of the Australian viewpoint regarding unfair competition. The sections of the law referred to in the discussion immediately following are found in this second part of the act.

Section 4 declares it an offense for any person to make a contract or enter into a combination in relation to interstate or foreign commerce "to the destruction or injury of or with intent to destroy or injure by means of unfair competition any Australian industry the preservation of which is advantageous to the Commonwealth, having due regard to the interests of producers, workers, and consumers," and declares further that every such contract shall be illegal and void.

Section 6 defines unfair competition as follows:

(1) For the purposes of section 4 and section 10 of this act, unfair competition means competition which is unfair in the circumstances; and in the following cases the competition shall be deemed to be unfair unless the contrary is proved:

(*a*) If the defendant is a commercial trust.

(*b*) If the competition would probably or does in fact result in an inadequate remuneration for labor in the Australian industry.

(*c*) If the competition would probably or does in fact result in creating substantial disorganization in Australian industry or throwing workers out of employment.

(*d*) If the defendant, with respect to any goods or services which are the subject of the competition, gives, offers, or promises to any person any rebate, refund, discount, or reward upon condition that that person deals, or in consideration of that person having dealt, with the defendant to the exclusion of other persons dealing in similar goods or services.

(2) In determining whether the competition is unfair, regard shall be had to the management, the processes, the plant, and the machinery employed or adopted in the Australian industry affected by the competition being reasonably efficient, effective, and up to date.

It should be noted in the first place that unfair competition is presumed if the defendant is a member of a "commercial trust," by which term is meant substantially every form of combination to restrict competition, whether by agreement or by combining control of competitors through stock ownership, or some similar means.[1]

[1] See p. 243.

In other words, the attempt to restrict competition or to procure a monopoly is prima facie evidence of unfair competition.

In the second place, if the competition is of such a character as to probably result in inadequate remuneration for labor in Australian industry it is presumed to be unfair. Thus not unjustifiable damage to competitors, but indirect injury to the employees of competitors, is made a prima facie test of unfair competition.

Third, the specific practice of offering a rebate for exclusive dealing is presumptively unfair competition. This practice is obviously often directly connected with attempts to restrain or monopolize trade.

Section 7A provides furthermore that giving or promising rebates, etc., for exclusive dealing or for refraining from dealing with certain persons in relation to interstate or foreign commerce is an offense and that every contract to such ends is void, unless the defendant proves that the practice complained of was not to the detriment of the public, did not constitute unfair competition under the circumstances, and was not destructive of or injurious to any Australian industry.

7A. (1) Any person who, in relation to trade or commerce with other countries or among the States, either as principal or agent, in respect of dealings in any goods or services gives, offers, or promises to any other person any rebate, refund, discount, concession, or reward for the reason, or upon the condition, express or implied, that the latter person (*a*) deals, or has dealt, or will deal, or intends to deal exclusively with any person, either in relation to any particular goods or services or generally; or (*b*) deals, or has dealt, or will deal, or intends to deal exclusively with members of a commercial trust, either in relation to any particular goods or services or generally; or (*c*) does not deal, or has not dealt, or will not deal, or does not intend to deal with certain persons, either in relation to any particular goods or services or generally; or (*d*) is or becomes a member of a commercial trust; is guilty of an offense.

Penalty, £500.

(2) Every contract made or entered into in contravention of this section shall be absolutely illegal and void.

(3) It shall be a defense to a prosecution under this section, and an answer to an allegation that a contract was made or entered into in contravention of this section, if the party alleged to have contravened this section proves that the matter or thing alleged to have been done in contravention of this section was not to the detriment of the public, and did not constitute competition which was unfair in the circumstances, and was not destructive of or injurious to any Australian industry.

The language of this section also shows that a direct relation is assumed to exist between practices of a monopolistic character and unfair competition.

Section 7B provides that anyone who refuses to sell goods or services to any person, either absolutely or except on disadvantageous

conditions, because the latter deals with another person, or because the latter is not a commercial trust, is guilty of an offense.

This section condemns practices which have a monopolistic tendency. Although such acts are not specifically characterized as "unfair," the analogy to those prohibited in section 7A is so close that this provision should be noted in this connection.

The remedial provisions with regard to the foregoing acts of unfair competition have been outlined in Chapter V,[1] and are, therefore, not repeated here in detail. Not only are the acts of unfair competition which are prohibited in sections 4 and 7A made criminal offenses punishable by fine, but, furthermore, it is provided in section 10 that such acts of unfair competition may be enjoined by the courts in proceedings instituted by the attorney general. Disobedience to such injunction is made punishable by fine in section 10A. Furthermore, it is provided in section 11 that any person injured in person or property by such acts of unfair competition prohibited by the law or in contravention to an injunction made in accordance therewith may sue for and recover treble damages for injury sustained.

Finally, section 15 provides that where a person has filed with the Attorney General and published in the Gazette a statutory declaration regarding a particular contract or combination he is not to be deemed to have intentionally violated the law unless such person shall have been notified by the attorney general that he considers the contract or combination likely to restrain trade or commerce to the detriment of the public or to destroy or injure an Australian industry by unfair competition.

The third part of this act, relating to the "prevention of dumping," as noted above, contains prohibitions against unfair competition.

The general purpose of this part of the law is to prevent or restrict the importation of goods into Australia under certain conditions and in particular where such importation is regarded as creating unfair competition.

Section 17 of the law defines the general circumstances under which the question of unfair competition may be raised as follows:

> Unfair competition has in all cases reference to competition with those Australian industries, the preservation of which, in the opinion of the comptroller general or a justice as the case may be, is advantageous to the Commonwealth, having due regard to the interests of producers, workers, and consumers.

The legality of a given practice might be affected by this law with respect to one industry and not with respect to another, depending largely on economic conditions and without regard apparently to general principles of jurisprudence.

[1] See p. 243.

Section 18 of the law defines unfair competition for the purposes of this act substantially as follows: Competition shall be deemed unfair, unless the contrary is proved; (1) if it would probably result in stopping the production of Australian goods or in their being sold at a loss, unless produced at an inadequate remuneration for labor, or if it would probably result in an inadequate remuneration for labor in Australian industry, or in disorganizing such labor, or throwing it out of employment; (2) if the methods of importation are unfair, under the circumstances, in the opinion of the constituted authorities, or if the importer has purchased the goods imported at prices below the cost of production, or if such goods are being sold at prices which do not give a fair profit to the importer on the basis of their fair foreign market value or selling value, if sold in the country of production, allowance being also made for freight charges to Australia and customs duties; (3) but, in determining whether the competition is unfair, regard must be had to whether the Australian industry is reasonably "efficient" and "up-to-date."

18. (1) For the purposes of this part of this act, competition shall be deemed to be unfair, unless the contrary is proved, if (*a*) under ordinary circumstances of trade it would probably lead to the Australian goods being no longer produced or being withdrawn from the market or being sold at a loss unless produced at an inadequate remuneration for labor; or (*b*) the means adopted by the person importing or selling the imported goods are, in the opinion of the comptroller general or a justice as the case may be, unfair in the circumstances; or (*c*) the competition would probably or does in fact result in an inadequate remuneration for labor in the Australian industry; or (*d*) the competition would probably or does in fact result in creating any substantial disorganization in Australian industry or throwing workers out of employment; or (*e*) the imported goods have been purchased abroad by or for the importer, from the manufacturer or some person acting for or in combination with him or accounting to him, at prices greatly below their ordinary cost of production where produced or market price where purchased; or (*f*) the imported goods are imported by or for the manufacturer or some person acting for or in combination with him or accounting to him, and are being sold in Australia at a price which is less than gives the person importing or selling them a fair profit upon their fair foreign market value, or their fair selling value if sold in the country of production, together with all charges after shipment from the place whence the goods are exported directly to Australia (including customs duty).

(2) In determining whether the competition is unfair regard shall be had to the management, the processes, the plant, and the machinery employed or adopted in the Australian industry affected by the competition being reasonably efficient, effective, and up-to-date.

A peculiar procedure is established for the enforcement of these provisions regarding "dumping," the principal features of which, briefly stated, are as follows: Complaints are first made to the comptroller general, who, if he has reason to believe that any person is importing goods "with intent to destroy or injure any Australian

industry by their sale or disposal within the Commonwealth in unfair competition with any Australian goods" shall, after giving hearing to the importer, issue a certificate regarding the facts in the case to the minister, who in turn may refer it to a justice of the High Court for determining whether such importation should be prohibited or limited. The justice may investigate the matter alone or refer it to the full court. The proceedings are informal and the decision final. The governor general, however, may immediately or subsequently rescind either prohibition or restriction, and such orders must be laid before both houses of Parliament.

EGYPT.—Articles 212 and 213 of the Civil Code of Egypt for Mixed Tribunals[1] are somewhat similar to articles 1382 and 1383 of the French Civil Code. There are also several provisions of the Penal Code that are of interest in connection with the subject of unfair competition.

Penal Code.—Article 311 of the Penal Code for Mixed Tribunals[2] provides against deceiving purchasers as to the quality of goods.

ART. 311. Whosoever shall have deceived a purchaser as to the standard quality of articles of gold and silver, or the quality of a sham stone sold as genuine, or the character of any other goods, and whosoever, by using false weights or false measures, shall have deceived the purchaser as to the quantity of the thing sold, shall be sentenced to imprisonment for a period of from one month to one year and a fine which may not exceed one-fourth of the restitution to be made nor be in any case less than 30 P. T.[3] The false weights and false measures shall, in addition, be broken up and destroyed.

Article 302 of the Penal Code for Native Tribunals[4] contains a similar provision.

Articles 312 to 315 of the Penal Code for Mixed Tribunals relate to the infringement of copyrights, the counterfeiting of works of art and musical productions, and the sale of works or goods bearing false trade-marks. The language of these articles is as follows:

ART. 312. Any person shall be guilty of the misdemeanor of infringement who shall have printed or caused to be printed any books in breach of the laws and rules and regulations relating to the property of authors, or who shall have manufactured or caused to be manufactured any article whatsoever for which an exclusive privilege has been granted either to a private individual or an association.

ART. 313. Any works or articles which constitute an infringement shall be confiscated in favor of the person possessing the privilege, and the party guilty of the infringement shall be punished with a fine of from 500 to 10,000 P. T. The introduction into Egyptian territory of productions of that character made

[1] Codes Egyptiens, Alexandrie, 1875, p. 55.

[2] The Egyptian Codes, Trans. London, 1892; see also Codes des Tribunaux Mixtes d'Egypte, Alexandrie, 1907.

[3] Turkish pounds.

[4] Code Pénal des Tribunaux Indigènes, Le Caire, 1907; see also The Penal Code of the Egyptian Native Tribunals, Trans. Cairo, 1906.

in imitation abroad shall likewise be punished with a fine of from 500 to 10,000 P. T., and the penalty against anyone who shall have sold or offered for sale any books or articles which constitute an infringement, knowing them to be such, shall be a fine of from 100 to 2,500 P. T.

ART. 314. The penalty of a fine of from 500 to 10,000 P. T. shall also be imposed upon any persons who shall have counterfeited any works of art or musical productions belonging to the authors thereof or their assignees or any trade-marks belonging exclusively to a manufacturer as provided by the rules and regulations.

ART. 315. The penalty of a fine of from 100 to 2,500 P. T. shall likewise be incurred by any persons who shall have sold or offered for sale any works constituting an infringement or any goods upon which there shall be such false trade-marks, or who shall have performed or caused to be performed in public any musical or theatrical works to the prejudice of the author thereof.

The commerce court of Alexandria declared it to constitute unfair competition for a business man, on opening a new shop, to lay claim to the telephone number of the firm of which he had formerly been a member, for the only purpose of such a demand was to deceive customers as to the identity of the shop which they called up.[1]

A tramway concern, authorized under a Government concession to establish a ferry on the Nile for the service and connection of its lines, availed itself of this privilege in order to exploit a Nile passage and transport service independently of its cars. The court of appeals held that a holder of a later Government franchise for the exploitation of certain ferries and the collection of passage fares was entitled to demand that the tramway concern confine itself within the limits of its concession and refrain from competing with the other franchise holder in this unfair manner.[2]

A German manufacturer placed on his razors the words "Guaranteed Sheffield razor." The Sheffield cutlery corporation of England brought suit. The court held that this act was unfair competition, even if the steel used in making the razors came from England, and ordered the defendant to efface the word Sheffield. The court said: "It is prohibited to a manufacturer, under penalty of unfair competition and damages, to place on his merchandise statements of a nature to establish confusion and to divert the clientele of a locality or of an industrial establishment which is engaged especially in the same kind of manufacture."[3]

Section 3. France.

GENERAL PRINCIPLES.—The expression "unfair competition" (concurrence déloyale), although not found or defined anywhere in the

[1] Trib. comm. Alex., 17 mars 1913; Gazette des Tribunaux Mixtes d'Égypte, tome III, Alexandrie (1913), p. 120.

[2] Alexandrie, 30 mars 1904; Répertoire général de la jurisprudence mixte Égyptienne, Florence 1907, vol. II, p. 509.

[3] Alexandrie, 15 mars 1899; Répertoire général de la jurisprudence mixte Égyptienne, Florence 1907, vol. II, p. 127.

codes or statutes of France, is nevertheless in general use by the courts.[1] A definition frequently found in legal treatises is:[2]

An act committed in bad faith with a view to producing confusion between the products of two manufacturers or of two merchants, or which, without producing confusion, casts discredit upon a rival establishment.

This definition does not fully cover the multitudinous acts which the courts have considered as unfair competition. According to one writer, these acts fall logically into four general classes, which may be described as follows:[3]

(1) Acts intended to produce confusion between similar establishments, such as the adoption of similar designations or the imitation of the exterior characteristics, interior fittings, etc., of shops or stores.

(2) Acts intended to produce confusion between the products of two different establishments, such as the imitation of trade-marks, trade names, forms of containers or wrappers, forms of products, titles of works, etc.

(3) Acts which, without producing confusion, are intended to divert the clientele of a manufacturer or merchant, such as magnifying one's own merits or the merits of one's own goods, on the one hand, or vilifying another or disparaging another's goods, on the other hand.

(4) Acts of unfair competition resulting from the violation of contracts and agreements.

According to French writers, unfair competition relates in principle only to transactions between persons engaged in similar lines of business. The word "competition" assumes, in effect, a struggle between rivals for the purpose of winning the favor of the public for their products or services. There are some cases of unfair competition in French reports between individuals other than merchants, as, for example, notaries, attorneys, trustees, philanthropic societies, etc.[4]

The cardinal principle of unfair competition in France, as shown by the court decisions, is intent to injure. French jurisprudence makes a distinction between unfair competition (concurrence déloyale) and unlawful competition (concurrence illicite), based on the existence or nonexistence of wrongful intent. Where an act is done with intent to injure or deceive it is considered an act of unfair competition, but where a person in good faith commits a legal wrong

[1] Allart says: "There does not exist a law on unfair competition; the legislator, in fact, can not codify a matter whose elements present an extreme diversity without a sufficient bond to unite them." (H. Allart, Traité théorique et pratique de la concurrence déloyale, Paris, 1892, p. V.)

[2] Pouillet, Traité des marques de fabrique et de la concurrence déloyale, 6me éd., p. 716.

[3] Fuzier-Herman, Répertoire Général Alphabétique du Droit Français, tome 13, p. 63.

[4] The Court of Cassation has decided that the act of a notary in establishing in a community situated 8 kilometers distant from his legal residence an office in which he exercised the functions of a notary constituted an act of unfair competition against a resident notary in the same community. In this case the defendant also rented a house under the name of his sister and had his name appear upon the door. (Cass. req., 6 janv., 1908, J. c. P.; Annales de la Propriété industrielle, artistique et littéraire, 1908, II, p. 69.) Hereafter this publication is cited as Annales.

or simply through negligence or carelessness injures another it is considered an act of unlawful competition. Such an act is regarded as a tort and affords a private right of action to the injured party.[1]

Acts of unfair competition and of unlawful competition in France have been actionable under articles 1382 and 1383 of the Civil Code since its adoption in 1808.[2] On the basis of article 1382 the courts have developed the jurisprudence of unfair competition. The language of these two articles is as follows:

ART. 1382. Any act whatever by a person which causes injury to another obliges him by the fault of whom it happened to compensate it.

ART. 1383. Each one is responsible for the injury which he has caused not only by his act but also by his negligence or by his imprudence.

Actions to enjoin unfair practices and to recover damages under these articles are conducted before the tribunals of commerce.[3]

In addition to the jurisprudence developed on the basis of these two articles, special laws have been passed from time to time making certain practices penal offenses punishable with fine or imprisonment. The Penal Code also contains a number of articles relating to particular acts of unfair competition. Criminal prosecutions under these penal provisions, however, do not take from the individual the right of action for damages under the general provisions of law contained in the above articles of the Civil Code.

SPECIAL LAWS.

The more important acts of unfair competition covered by special laws are:

1. The alteration or substitution of names affixed to manufactured products. (Law of July 28, 1824.)
2. Misuse of the title of patentee. (Law of July 5, 1844.)
3. The misappropriation or misuse of trade-marks. (Law of June 23, 1857.)
4. The practice of fraud in the sale of merchandise. (Law of Aug. 1, 1905.)
5. The misappropriation of industrial awards. (Law of 1886, superseded by the law of Aug. 8, 1912.)

In addition to the above laws, there are various other decrees or acts of less importance relating in a general way to the subject of unfair competition.[4]

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[1] Pouillet, op. cit., p. 723.

[2] Lobe, Bekämpfung des unlauteren Wettbewerbs, I. S. 80.

[3] The tribunals of commerce are courts composed of merchants. Each has a president and at least two members chosen by the merchants of a district. There are 214 such courts in France. Their jurisdiction is confined to commercial cases. Appeal can be taken to the courts of appeal, of which there are 26. (Cuche, Manual de Procédure civile et commerciale (1909), p. 69.)

[4] For a list of these laws, see Lobe, op. cit., I. S. 83–85.

THE LAW OF 1824.—The law of July 28, 1824,[1] prohibits the usurpation of commercial names used to distinguish manufactured articles. Its purpose is to protect the manufacturer who affixes to his goods as a distinctive mark his personal name, name of his establishment, or name of his place of manufacture. This law has only two articles, the second of which is not important in this connection. Article 1 is as follows:

> Whoever shall affix to manufactured articles or make appear on them by addition, curtailment, or any alteration whatever, the name of a manufacturer other than the one who is the producer, or the name of a factory other than the one in which the said articles were made, or, finally, the name of a place other than that of manufacture shall be punished with the penalties prescribed in article 423 of the Penal Code, without prejudice to an action for damages, if it takes place.
>
> Every merchant, middleman, or retailer shall be liable to prosecution if he knowingly offers for sale or puts in circulation articles marked with names substituted or altered.

Article 423 of the Penal Code, referred to in the first paragraph, provided a penalty of imprisonment of from three months to a year and a fine of not less than 50 francs, but not exceeding one-fourth of the amount paid for restitution and damages. These penalties have been superseded by the penalties provided for in section 15 of the law of August 1, 1905. They now consist of imprisonment from three months to a year or a fine of from 100 to 5,000 francs, or both.

The law of 1824 does not prohibit the usurpation or imitation of names affixed to products of nature, nor does it prohibit the usurpation or misuse of the names which merchants or middlemen may affix to the manufactured articles which they handle, or the use of such names in any other form than by affixing, such as in prospectuses, advertisements, or newspaper notices.[2] These defects have led to a movement for a revision of the law. A bill for this purpose was introduced in 1911.[3]

By "name of a manufacturer" is meant a person's family name or Christian name or both. Assumed names are also protected. Imaginary names are only protected when used as assumed names. All the purely imaginary names designating not the manufacturer but the product, such as commercial designations and fancy names, are not protected by the law of 1824. If used as trade-marks they are protected by the law of 1857. (See p. 562.)

The imitation of a name need not be exact in order to constitute an infraction of the law of 1824. If it is sufficiently similar to cause

[1] Loi des 28 juillet–4 août, 1824, relative aux altérations ou suppositions de noms dans les produits fabriqués.

[2] Pouillet, op. cit., pp. 646, 667.

[3] Pouillet, op. cit., pp. 576, 586.

confusion, the courts will protect the plaintiff. Pouillet makes the following statement on this point:[1]

> Let us hold as certain that it is not necessary that the name be identically copied in order to constitute a misdemeanor; the penalties of the law of 1824 would be incurred even though the name usurped should be accompanied by a Christian name (prénom) other than the real name; also if one letter should be substituted for another; or if the name should be slightly altered while keeping its general aspect and its principal sound.

The law of 1824 not only prohibits the usurpation of trade names, but also the substitution of one name for another. The words in article 1, "make appear by alteration, addition, or curtailment," have been interpreted by the courts to apply to those cases in which a person removes the name of a manufacturer having a reputation from some of the latter's goods which he has procured, and replaces it with his own name in order to acquire for himself the same reputation.[2]

It also applies to cases where a person appropriates the bottles or other forms of containers of a competitor bearing a name protected by this law and sells his goods therein. The court so decided in a case in which a manufacturer of seltzer water used some syphons bearing the name of another manufacturer.[3]

The name usurped or imitated does not have to be affixed to manufactured goods themselves. It is sufficient if it is affixed to the containers or wrappers of the goods.[4] The court has held, however, that the use of a usurped name on the invoices or bills of lading accompanying the products should not be construed as being affixed to the products themselves.[5]

In judging whether a name has been usurped or imitated, the courts first inquire whether that name is distinctive and special, or whether it is generic and necessary to describe the object to which it has been affixed. Wherever a name has become a common name of manufactured articles, the courts refuse to protect the manufacturer in its use. A family name is rarely of this character, since in principle it constitutes an inalienable possession. Only when it has been given to an object for which no other name exists will the courts consider it open to general use. Names of establishments or places of manufacture, however, become generic more often than family names.

In the second place, the courts inquire whether the imitation is sufficiently like the original name to cause confusion between two

[1] Pouillet, op. cit., p. 651.
[2] Pouillet, op. cit., p. 648.
[3] Paris (4 ch.), 30 juill., 1909; Annales 1910, p. 50, for full title see p. 558, note 4.
[3] Paris (4 ch.), 30 juill. 1909; Annales 1910, p. 50, for full title see p. 558, note 4.
1913, I., p. 24.
[5] Cass. crim., 18 nov. 1904; Annales 1905, p. 182.

products. Hence, the cases of unfair competition prosecuted under the law of 1824 always involve confusion of products. They are similar in principle to cases of confusion between competing establishments. A few cases brought under this law are given below. For additional cases of a similar character, see page 573.

A dealer in firearms arranged with the manufacturer to affix to his goods the name "Société française des cycles, armes et sports," in imitation of the name used by a competitor "Manufacture française d'armes et cycles." The court held that, in using this name as a designation of their products, the defendant dealer and manufacturer had created confusion between their products and those of plaintiff in violation of article 1 of the law of July 28, 1824.[1]

A manufacturer of vinegar located at Fives-Lille placed on his casks a vignette bearing the following notice: "Guaranteed pure vinegar—special make of Orleans vinegar." The vignette and the type were combined in such a way as to make prominent the words "Orleans vinegar" and thereby to lead the public to think that the cask contained vinegar coming from Orleans. The court held that this constituted a violation of article 1 of the law of July 28, 1824. The plea of defendant that the word "Orleans" had come into general use and no longer referred to the provenance of the vinegar, but simply to a process of manufacture, was rejected.[2]

LAW OF 1844.—The law of July 5, 1844,[3] contains, in addition to the various regulations and details of administration of patents, one article relating especially to unfair competition. Article 33, which prohibits one form of assuming false titles in order to magnify one's own merits and thereby to attract a clientele, is as follows:

ART. 33. Whoever, on the insignia, announcements, prospectuses, placards, trade-marks, or stamps, shall take the title of patentee without possessing a patent issued in conformity with the laws or after the expiration of a former patent, or who, being a patentee, shall mention his title of patentee or his patent without adding to it these words, "without guarantee of the Government," shall be punished with a fine of from 50 to 1,000 francs.

In case of a second offense the fine may be doubled.

LAW OF 1857.—The law of June 23, 1857,[4] makes not only the infringement but also the misappropriation or misuse of registered trade-marks a penal offense. The latter practices, especially, constitute acts of unfair competition since they lead to confusion regarding competing products, and thus injure competitors whose trade-marks are misappropriated or misused. In France, as in some other countries, unfair practices involving registered trade-marks are

[1] Cass. crim. rej., 25 oct. 1907, Gaucher et Baley, c. Manufacture française d'armes et cycles; Annales 1908, I, p. 170.

[2] Cass. crim., 28 nov. 1895, Beaucamps c. Dessaux; Annales 1896, p. 149.

[3] Loi du 5 juill. 1844, sur les brevets d'invention.

[4] Loi du 23 juin 1857, sur les marques de fabrique et de commerce, modifiée par la loi du 3 mai 1890.

punished as penal offenses while similar practices involving unregistered trade-marks are actionable as civil misdemeanors and called unfair competition. Since the practices are similar in character some consideration is given here to those dealt with under the trade-mark law while other practices are discussed later. (See p. 573.)

The various designations that may be used as trade-marks are set forth in the last paragraph of article 1 of the law of 1857, as follows:

Names under a distinctive form, denominations, emblems, impressions, stamps, seals, vignettes, reliefs, letters, figures, wrappers, and all other signs serving to distinguish the products of a factory or the objects of commerce are considered as trade-marks of manufacture and of commerce.

The law of 1857 is much broader in scope than the law of 1824, since it protects the trade-marks of merchants and agriculturalists as well as those of manufacturers and the trade-marks affixed to products of nature as well as manufactured products. There is some overlapping of the two laws, for names of manufacturers, firm names, and names of places of manufacture, which are protected by the law of 1824, can also be used as trade-marks, providing they are of a distinctive form, and thus receive the protection of both laws. The law of 1857 protects the trade-mark as a whole, while the law of 1824 protects the name which constitutes one of the elements of the trade-mark.[1]

Articles 7 and 8 prescribe the penalties for the wrongful use of trade-marks. The former relates to counterfeit or copied trade-marks and the latter to fraudulently imitated trade-marks.

ARTICLE 7. Those persons are punished with a fine of from 50 to 3,000 francs or imprisonment from three months to three years, or both:

(1) Who have counterfeited a trade-mark or made use of a counterfeited trade-mark.

(2) Who have fraudulently affixed to their products or to the objects of their commerce a trade-mark belonging to another.

(3) Who have knowingly sold or put on sale one or more products bearing a trade-mark counterfeited or fraudulently affixed.

ARTICLE 8. Those persons are punished with a fine of from 50 to 2,000 francs or imprisonment from one month to one year, or both:

(1) Who, without counterfeiting a trade-mark, have made a fraudulent imitation of it of a nature to deceive the purchaser or have made use of a trade-mark fraudulently imitated.

(2) Who have made use of a trade-mark bearing indications apt to deceive the purchaser as to the nature of the product.

(3) Who have knowingly sold or offered for sale one or more products bearing a trade-mark fraudulently imitated or indications apt to deceive the purchaser as to the nature of the product.

[1] The Court of Bordeaux in 1910, in a case where a name which constituted both the commercial name of a third party and an essential element of a trade-mark had been fraudulently affixed to manufactured articles, held that the act furnished ground for the simultaneous application of the laws of 1824 and 1857. (Bordeaux, 19 juill. 1910, Gautier frères c. Moyet-Gautier; Annales 1911, II, p. 17.)

According to article 9 less severe penalties are provided for the failure to place on certain goods the trade-marks which have been declared obligatory. Article 11 provides that the penalties prescribed by articles 7, 8, and 9 may be doubled in case of a second offense. Violations of these provisions are prosecuted before the civil tribunals.

The various acts specified in articles 7 and 8 of the law as constituting misdemeanors are:

1. The counterfeiting of a trade-mark.
2. The fraudulent imitation of a trade-mark of a nature to deceive the purchaser.
3. The fraudulent affixing to one's goods of a trade-mark belonging to another.
4. The use of a trade-mark, counterfeited or fraudulently imitated.
5. The sale or offer for sale knowingly of goods bearing trade-marks counterfeited or fraudulently imitated.

By "counterfeiting" is meant the servile reproduction of another's trade-mark, while by "fraudulent imitation" is meant the disguised reproduction. The act of reproducing is considered entirely distinct from the act of using a trade-mark. It constitutes a misdemeanor if the reproduction is such as would deceive the public.

The practice of imitating trade-marks is apparently much more common than reproducing them exactly. The forms of imitations are innumerable. In determining whether such practices constitute misdemeanors within the meaning of the law the courts must take each case on its merits. The two guiding principles are, first, whether there has been fraudulent intent; and, second, whether the imitation is of a nature to deceive the purchaser. If the imitation is not such as would produce a confusion between rival products in the mind of the public no offense is committed.[1] It is not necessary, however, to prove that the purchaser has actually been deceived.

The method employed by the courts to determine whether an imitation is a misdemeanor is described by Dalloz in a summary of a case as follows:[2]

> A trade-mark of manufacture or commerce constitutes a fraudulent imitation of a previously registered trade-mark if in comparing the two trade-marks and examining their elements in detail one finds a similarity of sound and appearance of a nature to deceive the ear and the eye and resemblances which can not be the result of accident and have been manifestly chosen and adapted to the unlawful purpose of producing confusion between the trade-marks.

The courts have considered as fraudulent imitations the trade-marks "Chocolat du Meunier" or "Chocolat le Meunier" as compared with "Chocolat Menier;" "Fromages de la Petite Normande"

[1] Pouillet, op. cit., p. 297.

[2] Req., 30 oct. 1901, Voisin c. Juppet; Dalloz, Jurisprudence Générale, 1902, I, p. 32.

as compared with "Petits Fromages Normandes."[1] But the courts refused to consider as a fraudulent imitation the trade-mark "Graisse Monopole" as compared with "Vaseline Monopole" when placed in dissimilar receptacles, or "Quinquina Saint-Marcel" as compared with "Saint-Raphael Quinquina."[2]

A common practice is for a merchant to imitate the trade-mark of a competitor, as closely as possible, being careful to add his own name to it in the belief that this will prevent any prosecution for fraudulent imitation. According to Pouillet the courts do not hesitate to recognize such practices as violations of the law of 1857. The same principle applies where the essential features of a trade-mark are reproduced but different words are substituted for those used on the original. An umbrella manufacturer registered as a trade-mark a triangle within which were arranged three umbrellas and the word "Veritas." A competitor adopted a similar trade-mark but changed the word "Veritas" to "Tigre." He also put on the base the words "Registered trade-mark" when it had never been registered, thereby showing wrongful intent. The court held this to be a violation of the law of 1857.[3]

By fraudulent affixing of another's trade-mark is meant the act of the one who procures the real trade-mark of another person and uses it to mark his own products. This practice is most common in the case of products of such a nature that the trade-marks must be affixed to their wrappers or containers rather than to the products themselves, thus affording an opportunity to use these wrappers or containers for the sale of goods of inferior quality.

A manufacturer of seltzer water put his product on sale in siphons bearing the trade-marks of a competitor. He was adjudged guilty of infraction of the law of 1857.[4]

In another case the Court of Cassation held that a merchant who sold to consumers in a bottle bearing the words "Amer Picon, Philippeville" liquor not produced by the house of Picon committed the misdemeanor of fraudulently affixing the trade-mark of another, which act was prohibited by section 7 of the law of 1857.[5]

Every fraudulent use of a trade-mark falls under the scope of the law of 1857. Not only the affixing of a usurped trade-mark to goods but also the reproduction of it in announcements or prospectuses can constitute a misdemeanor. A frequent practice is the use of the real trade-mark in advertisements with the purpose of preparing for a

[1] Pouillet, op cit., p. 307.
[2] Pouillet, op. cit., p. 312.
[3] Aix, 16 janv. 1908. Revel père et fils et Courtinat c. Ogliastro et autres; Annales 1908, I, p. 223.
[4] Trib. civ. Seine (3me ch.), nov. 1909, Chambre Syndicale des Eaux Gazeuses et Landinet c. Plarut; Annales 1910, I, p. 55.
[5] Cass. req., 5 août 1890, Picon et Cie, c. Mollier; Annales 1893, p. 256.

substitution of a competing product for the one bearing the trade-mark.[1]

The following case illustrates such a fraudulent use:

A pharmacist placed on the glass front of his store a placard bearing the words in large type "Goudron et capsules Guyot à 1 f. 25." When customers called for the preparation known as "Goudron Guyot" (Guyot tar) they were given a flask covered in such a way that the purchaser could not read the label of the flask bearing "Goudron Georges Guyot de Chalon-sur-Saône." The court held that it is not unlawful for a druggist to use a placard bearing a trade-mark (registered) if he only intends to announce the sale of the products manufactured by the proprietor of the trade-mark; but it is otherwise when the placard is used as a means to sell competing products.[2]

In a similar case[3] a store attempted to sell under the trade-mark of a certain manufacturer whose goods it had advertised the goods of another competing concern. Regarding the application of section 7, the court said (p. 351):

> The affixing to a product of a usurped trade-mark and the use of the trade-mark constitute two different misdemeanors, the one provided for by paragraph 2 and the other by paragraph 1 of article 7 of the law [of 1857]. The latter provision has a much more extended field of application than the former. It aims to reach the usurpation of the trade-mark under whatever form it may present itself and to prevent the public from being deceived by the usurpation. According to doctrine and jurisprudence, it affects the use of the trade-mark in invoices and it does not appear why it would not affect prospectuses and catalogues, which quite as well as invoices are susceptible of deceiving the public.

Selling or putting on sale articles bearing trade-marks which are counterfeit or fraudulent imitations constitutes a misdemeanor if it is done knowingly. The courts must determine in each case whether the merchant or retailer had knowledge that the articles sold bore fraudulent trade-marks.

In a case in which a retailer sold goods bearing a counterfeited label concurrently with the goods bearing the original trade-mark the court held that he could not invoke his good faith, for by simple inspection of the two products he could convince himself of the fraudulent imitation. He was, therefore, held to have violated section 8 of the law.[4]

A manufacturer of ivory combs imitated the trade-mark of a competitor, which was a picture of an elephant, with some words above and below, but substituted the word "Mammoth" in place of those

[1] Annales 1909, I, p. 267, footnote.

[2] Cass. civ., 15 février 1909, Champigny et Cie. c. Yvon; Annales 1909, I, p. 266.

[3] Lyon, 6 juill. 1912, Laniel c. Société des Grands Magasins des Cordeliers; Annales 1913, I, p. 349.

[4] Montpellier, 23 août 1875, F. Prot et Cie. c. Mongauzi; Annales 1875, p. 365.

on the original trade-mark. The proprietor of the original trade-mark brought suit against him, and also against a retailer who had sold the combs with the usurped trade-mark. The court held that this retailer, because of his trade, could not be ignorant of the existence of the different trade-marks serving to distinguish combs, and that in putting on sale the combs of the defendant manufacturer, bearing the picture of an elephant, he had made himself an accomplice in the fraudulent practices of the latter and was jointly liable for the injury caused.[1]

LAW OF 1905.—The law of August 1, 1905,[2] relates primarily to the prevention of fraud in the sale of merchandise and of adulterations of foodstuffs and agricultural products. In some respects this law, especially article 1, is supplementary to the laws of 1824 and 1857, and is therefore of some interest in respect to the question of unfair competition. Its aim, however, is primarily to protect the consumer against frauds of a nature to injure the public health. Article 1 prescribes a penalty of imprisonment for from three months to one year or a fine of from 100 to 5,000 francs, or both, for anyone attempting to deceive a contracting party (1) as to the nature, the substantial qualities, composition, and useful content of any commodity; (2) as to the kind or origin of commodities, provided that the false designation is the principal cause of sale; and (3) as to the quantity of things delivered or as to their identity by delivering an article other than the one specified in the contract.

According to this article, the use of certain designations of a nature to deceive the purchaser in regard to the quality, quantity, origin, etc., of goods is prohibited, and the proprietor of the true designations is thus protected, but the scope of the law is limited to transactions between contracting parties, which are generally wholesale transactions. It does not cover the fraudulent substitution of one article for another in the retail trade.[3] The law also requires that the use of false designations of kind or origin must be the principal cause of the sale of an article, thus further limiting its effectiveness in preventing certain unfair practices.

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[1] Trib. civ. Seine, 26 avril 1898, Vilcocq c. Quidet père et fils et Marchandise; Annales 1899, p. 354.

[2] Loi du 1 août 1905, sur la répression des fraudes dans la vente des marchandises et des falsifications des denrées alimentaires et des produits agricoles.

[3] In a case involving the substitution of a different kind of tooth wash for the one demanded, action was brought under section 1 of this law by the proprietor of the article discriminated against. The court said:

"The plaintiff appears to have availed herself of a provision which could not be applied in this case, trade-marks being protected by the special laws, and the law of 1905 not having been enacted as a weapon in the matter of commercial competition * * * the right of prosecution in the matter of fraud belongs only to the public prosecutor or to those who, having contracted, have been deceived by the fraudulent acts."

The action by the proprietor of the product which had been discriminated against was therefore dismissed. Trib. corr. Seine (8 ch.), 11 mars 1911, Vve. Waldeck-Rousseau; Annales 1912, I, p. 5.

Suits for violation of this law can be brought only by the public prosecutor or the contracting party who is the victim of the fraudulent use of a designation. A manufacturer whose product has been discriminated against has no right of action under this law.

LAWS OF 1886 AND 1912.—The law of April 30, 1886,[1] reserved the right to use medals, diplomas, prizes, and other honorific distinctions awarded by expositions and fairs to the persons or business houses who received such awards, and made it an offense, punishable with fine and imprisonment, for anyone to make an unlawful or fraudulent use of such awards. An important weakness of the law of 1886 was that it authorized the use of medals and prizes obtained at all expositions and fairs regardless of the conditions surrounding their organization. A fictitious exposition could be organized and medals and honorific distinctions could be distributed to unscrupulous merchants and manufacturers for profit. According to one writer, scarcely an exposition was held which did not have near it, often in the same town, a fictitious exposition which distributed medals patterned after those of the real exposition.[2]

The defects of the law of 1886 were remedied by the new law of August 8, 1912, relative to industrial awards, which provides in article 1 that only the awards of expositions and fairs organized, patronized, or authorized by the French Government or foreign Governments, or the awards of certain other specified bodies, can have a commercial or industrial use, and that before such awards can be used commercially or industrially they must be registered at the national office of industrial property.

Penalties for the infraction of this law are provided in article 9 as follows: A fine of from 50 to 6,000 francs or imprisonment from three months to two years, or both, shall be imposed upon—

1. Those who unlawfully and fraudulently attribute to themselves the awards specified by article 1, or imaginary awards, by affixing them to their products, signs, advertisements, etc.

2. Those who under the same conditions apply the awards to objects other than those for which they have been obtained.

3. Those who under the same conditions shall have prevailed with boards of expositions or competitions.

4. Those who by any artifice whatever, ambiguous wording or figurative sign, reproducing more or less exactly the conventional aspect of a medal, have attempted to induce the public to believe that they have obtained an award which in fact they did not receive.

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[1] Loi du 30 avril 1886, relative à l'usurpation des médailles et récompenses industrielles; Loi du 8 août 1912, sur les récompenses industrielles.

[2] Pouillet, op. cit., p. 835; see also Coquet, Les indications d'origine et la concurrence déloyale, 1913, p. 151.

5. Those who make an industrial or commercial use of awards other than those provided by article 1 of the law.

6. Those who, on the occasion of an exposition or competition, unduly avail themselves in circulars, prospectuses, placards, diplomas, certificates, etc., of the authorization or patronage of a minister or of any other authority or public administration without having previously obtained it, or who put on their documents, titles, mottoes, vignettes, coats of arms, or other signs and words of a nature to create a belief of such authorization or patronage.

Less severe penalties are prescribed for violation of the provisions for registration.

GENERAL PROVISIONS.

As stated above, many acts of unfair or unlawful competition in France are actionable only under the general provisions of articles 1382 and 1383 of the Civil Code (see p. 559), which permit actions to enjoin and to recover damages wherever incurred. Civil actions for damages may also be brought under these general provisions in cases covered by the special laws.

In all cases of unfair competition brought under article 1382 the existence of wrongful intent must be proved. Such intent may be shown by a single act or by a variety of acts, none of which taken by itself would be considered sufficient proof. This point was affirmed by an opinion of the court of Nancy in 1911. The court held that several practices, none of which taken separately could be characterized as unfair competition, may by their number, variety, and their combination reveal the fraudulent intent of their authors and constitute unfair competition.[1]

Some of the most important forms of unfair competition dealt with under the general provisions are discussed in detail under the various headings below.

CONFUSION AS TO ESTABLISHMENT.—Acts intended to produce confusion between similar establishments afford ground for civil actions under article 1382 of the civil code. None of the special laws relates directly to cases of this kind. Some of the important forms of unfair competition producing confusion between similar establishments are as follows:

1. Using similar trade names on signs, show windows, and in advertisements, prospectuses, etc.

2. Imitating various distinctive marks of an establishment, such as signs, store fronts, exhibits in show windows, interior fittings, etc.

3. Using titles which serve to connect one establishment with another, such as "successor to," "branch of," "ex-superintendent of," etc.

[1] Nancy, 25 nov. 1911, Tilguin et Cie., c. Société des Engins Graisseurs; Annales 1912, p. 258.

A person may use his family name, a firm name, fancy name, or name of a place to designate his establishment. The use of such names to distinguish one's products from those of competitors has been discussed in connection with the laws of 1824 and 1857.[1]

The general principles followed by the courts in determining whether the imitation of such names is unfair competition is (1) whether there is sufficient resemblance to cause confusion and divert the clientele, and (2) whether the names are special and distinctive or whether they are generic and necessary to designate the establishment.

The most frequent form of imitation of personal names occurs where a person with the same name as the proprietor of a well-known concern engages in the same kind of business and uses that name to designate his establishment. Every person has the right to use his name in this way, but in doing so he must not usurp by means of fraudulent confusion the advantages of the credit and reputation acquired by another.[2] In the absence of fraud the courts may not have the power to prevent a person from using his name—this is still a matter of controversy—but the courts undoubtedly have the power to correct abuses. Frequently a proprietor is required to use his Christian name with his family name and, if this is not sufficient, to add his address.[3]

A common method employed to secure the use of a name similar to that of another is to induce a person having the desired name to cede it or in the case of a firm or association to enter the business so that his name can be used. Where fraud of this kind exists the courts generally prohibit the use of the name entirely.

In a case involving the fraudulent use of the same family name the Court of Paris ordered the defendant to cease using this name by itself. Upon appeal the Court of Cassation affirmed the decision of the lower court.[4]

A person in order to compete against the well-known house of Gambier, engaged in the sale of pipes, induced a cooper named Gambier to permit the use of his name. The court declared this to be unfair competition and prohibited the use of the name by the rival house.[5]

The firm of Moët & Chandon, a well-known champagne house, had acquired a reputation for the brand "Moët," which name was used as a trade-mark. A rival concern was established with the name Moet & Co., the name being taken from an associate taken in for that purpose.

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[1] See pp. 560 and 562.

[2] Pandectes Françaises, Nouveau Répertoire de Doctrine, de Législation, et de Jurisprudence. Paris, 1895, tome 20, p. 36.

[3] Ibid, p. 40.

[4] Cass., 27 mars 1877, A. et M. Landon c. Renault; Annales 1877, p. 92.

[5] Paris, 21 mai 1865; Sirey, 1865–11–158; cited in Pandectes Françaises, tome 20, p. 38.

Prior to this time he had been an accountant in a pottery concern and was without capital or experience in the champagne business. The court prohibited the new concern from doing business under that name and awarded damages. Upon appeal the Court of Paris affirmed the decision.[1]

In respect to the imitation of invented names as business signs or designations, the courts have condemned, as constituting unfair competition, the use of "Nouveau café des Dames" for "Café des Dames," "citadin" for "citadine," and "Aux vrais gourmets" for "Café des gourmets."[2] On the other hand, the courts have declared that a commercial establishment which adopted the name "Agence des théâtres" to indicate its operations could not oppose the use of the name "Office des théâtres" by another establishment of the same kind, not only because such a designation was general, but also because no acts were shown which would lead to confusion between the two establishments.[3]

A new concern which established itself across the street from a well-known concern with the designation "Au Planteur" took for its name "Au nouveau Planteur" and gave its store front the same general appearance as that of the former. It also hired the director and various employees of the older house and sent them out as representatives to the customers of the latter one day earlier than the representatives of the older house were accustomed to call. The court held that the addition of the word "Nouveau" to the designation of the new concern was not sufficiently different from the sign of the older house to prevent confusion between the two establishments, especially since they were located opposite each other and had the same general appearance. The court therefore declared the use of this designation and the other practices of the defendant to be acts of unfair competition and awarded damages.[4]

But in a case in which a manufacturer of lamps in Paris who used the words "A la lampe merveilleuse" as a trade name and trademark sued a competitor for using the same words on the glass front of his establishment, the court held that this did not constitute unfair competition, since the words "lampe merveilleuse" were in general use and defendant had never used them alone, but always in connection with his own name, viz, "lampes merveilleuses Pigeon."[5]

Where a competitor copies the details of the entrance of a rival establishment in a manner to deceive the passer-by, or the arrangement of show windows, the costume of employees, etc., the courts recognize such practices as unfair competition.

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[1] Paris, 31 juill. 1874, Moët et Chandon c. Moet et Cie.; Annales 1874, p. 311.

[2] Pouillet, op. cit., p. 733.

[3] Trib. comm. Seine, 22 mai 1867, Mondin et Cie. c. Sari et autres; Annales 1868, p. 352. p. 352.

[4] Paris, 8 juill. 1910, Balzard et Cie, c. Lanoelle et Cie.; Annales 1910, p. 222.

[5] Paris, 11 mars 1892, Petithomme c. Pigeon; Annales 1896, p. 93.

A certain Théophile Pathé founded a business in Paris similar to that of the Pathé frères, and painted the front of his shop vermilion red in imitation of the color of his competitors' shop. The court declared that where a commercial establishment used vermilion red to distinguish its shop it acquired the exclusive right to such usage and the use of the same color by defendant was an act of unfair competition. Defendant also pretended in his advertisements that he was formerly connected with Pathé frères, and reproduced in his catalogues designs belonging to Pathé frères. As a result of the confusion which was caused some of the mail of Pathé frères was delivered to him. The court also held these acts to be unfair competition.[1]

Two persons founded at Marseille competing messenger services. One was called "Bicycle Messengers" and the other "Express-Boys." Defendant clothed his messenger boys in red uniforms like those worn by the employees of his competitor, and also caused similar tariffs to be distributed. The court held that, while defendant had the right to establish a competing business, these acts constituted unfair competition and defendant must discontinue the use of the red uniforms and pay damages.[2]

In a similar case decided a few days later the Court of Pau held that the act of a concern in Biarritz in organizing a messenger service and clothing its boys in uniforms similar to those of a messenger service at Bordeaux was not unfair competition, since, being located in places so far apart, no confusion could result between these two enterprises from the similarity of uniforms.[3]

Confusion between competing establishments may be caused by the use of such terms as "successor to," "ex-pupil of," "formerly connected with," "brother of," etc. More frequently, however, the use of such titles is ostensibly for the purpose of recommending one's products or establishment to the public.[4]

A common method of causing confusion is to put the words "pupil of" or "formerly connected with" in small type on signs or show windows and the name of the rival house in large letters, so that the eye of the passer-by will be deceived. In a case in which a merchant painted on the entrance of his shop in large letters the name of his former employer, preceded by the words "employee of," and on the glass front the same name in very conspicuous letters while his own name and the words "employee of" were in less visible letters, the court held that even if it is permissible for a person to take the title of employee of the house in which he has worked, it is on the condi-

[1] Paris, 6 avril 1911, Compagnie Générale des Phohnographes, etc., c. Compagnie des Cinématographes Théophile Pathé; Annales 1911, p. 333.
[2] Trib. comm. Marseille, 4 mai 1910, Daval c. Chaléat; Annales 1912, p. 29.
[3] Pau, 18 mai 1910, Vallet c. Le Meneust; Annales 1912, p. 26.
[4] For cases of this kind, see p. 581.

tion that this qualification is used in a way not to cause confusion, as was done in this case.[1]

CONFUSION AS TO PRODUCT.—Many of the acts intended to produce confusion between similar products are, as explained above (see p. 562), prosecuted under the special laws of 1824 and 1857 relative to the usurpation of trade names and trade-marks. Some cases of this kind, however, are actionable only under the general provisions of the Civil Code. Among such may be mentioned the following:

1. The usurpation of trade names affixed to other than manufactured products or affixed to manufactured products by persons other than manufacturers.

2. The imitation of trade-marks which have not been registered or of distinctive marks which are not regarded as trade-marks.

3. The misrepresentation of products in prospectuses, catalogues, advertisements, etc.

4. The imitation of titles of literary, artistic, and other intellectual works.

The principles involved in these cases are the same as those already outlined for similar cases prosecuted under the above-mentioned special laws. (See pp. 560 and 562.) The designation, form, or color of the imitations must be sufficiently like the originals to cause confusion in the minds of the public, and the marks which are infringed must be distinctive in order to receive protection.

In a case decided in 1859 the court declared as unfair competition the act of adopting the same shape of flagon, the same method of sealing it, and the same form of label as was used by a competitor, thereby creating a confusion of a nature to deceive the public.[2]

In another case the court declared it to be unfair competition for a manufacturer, after having catalogued the products which another manufacturer furnished him, to make these products himself and to continue selling them under the same catalogue description and number as if they were the products of the original manufacturer.[3]

On the other hand the act of a merchant in selling a product similar to that of another, even in cans of the same form and dimensions, was held not to constitute an act of unfair or unlawful competition since the products were sufficiently differentiated by their labels, one having the name "Equateur," while the other had the name "Victoria."[4]

In respect to the titles of publications the court has held that it was unfair to the proprietor of a financial journal, known as "le Capitaliste," for another journal of the same character to take the title

[1] Riom, 1er déc., 1903; cited by Pouillet, op. cit. p. 860.

[2] Paris, 3 août 1858, Barbier c. Simon; Annales 1859, p. 366.

[3] Trib. comm. Seine, 7 nov. 1908, Société des Engins Graisseurs. c. Hamelle; Annales 1909, II, p. 49.

[4] Toulouse, 17 fév. 1904, Lebrasseur c. Canonne; Dalloz, op. cit. 1905, II, p. 68.

"le Petit Capitaliste;" for, although the two publications might be different in form, price, and other characteristics, the similarity of the title would cause the public to regard defendant's journal as a supplement or a reproduction of plaintiff's journal and obviously cause it injury.[1]

A publisher in Verdun changed the name of his journal from "Courrier de Verdun" to "le Courrier Verdunois." Suit was brought by the publisher of another journal with the title "le Petit Verdunois" for a cessation of the publication and for damages. It was shown that the exterior aspect, and especially the title of defendant's publication, was similar to that of plaintiff's publication. The tribunal of commerce of Verdun held that there was confusion between the two journals resulting from the analogy of their titles, from their size, the manner of folding, and the manner in which they were or could be presented to the reader. Upon appeal the court of Nancy held that in order for unfair competition to exist it is not necessary that there be complete usurpation of the title of a journal, that the possibility of confusion between the two journals in question appeared manifest. It resulted from the fact that the same word "Verdunois," terminated the title of each journal, and from the similarity of the characters used in printing the title.[2]

A seed merchant inserted an advertisement in the journal, Le Petit Jardin, offering gratis a brochure to the readers of this publication. The pamphlet which he sent to those who replied was his catalogue containing an advertisement of the competing journal Mon Jardin. The court held the use of the latter title was unfair competition, as well as the method employed to secure a list of plaintiff's subscribers.[3]

SUBSTITUTION OF ONE PRODUCT FOR ANOTHER.—Where competing products are similar in name, taste, color, etc., the possibility of confusion is frequently taken advantage of, especially by retailers, to substitute another product for the one demanded. This constitutes not only a fraud upon the consumer, but also an act of unfair competition against persons whose products are subject to discrimination. Under article 1 of the law of August 1, 1905, such substitution in making deliveries constitutes a penal offense if the goods desired were contracted for. (See p. 567.) Prior to the passage of this law article 423 of the Penal Code was applicable to such substitution. Most cases of this kind are prosecuted under the Civil Code.

A manufacturer of canned goods alleged that a certain distributor regularly delivered to customers demanding his products the prod-

[1] Trib. comm. Seine, 7 avril 1881, Banque parisienne c. Perret; Annales 1881, p. 281.
[2] Nancy, 2 juill. 1906, Didier c. Laurent; Annales 1907, p. 20.
[3] Paris, 18 juin 1908, Société de librairies et imprimeries horticoles c. Arnaud et Cie. et Brancher; Annales 1909, II, p. 24.

ucts of a competitor of similar name, who was a party to the fraud; also, that no warning was given the customers, who believed that they were getting the products requested, or, when the customer perceived that the product asked for had not been delivered to him and demanded an explanation, affirmed that the products were genuine and not an imitation. The court held that if such acts occurred and were customary, they manifestly constituted unlawful acts of a nature to render the defendant liable, but in this case the proof of the allegations was not clear, nor was it established that the unfair acts were habitual.[1]

A liquor dealer served a customer who demanded some wine made by plaintiff with another kind bearing a similar name. The court held that such a substitution constituted an unfair act when accompanied by circumstances which rendered possible a confusion between the two products and which resulted in deceiving the consumer. The plea of the defendant that he had posted a placard in his establishment stating that he served only certain brands was rejected, for, in the opinion of the court, this notice might easily have escaped the consumer and was insufficient to remove all chance of error.[2]

A dealer's employee without calling the customer's attention to the substitution, gave a customer who asked for a jar of Simon facial cream a jar of another make bearing the label "Beauty cream; Paul Simon, Paris." The court held that a retailer who delivers an article similar to that specified without warning the purchaser of the substitution is liable for damages to the injured manufacturer even if done without fraudulent intent. It was not clear in this case whether the defendant had acted with fraudulent intent or not.[3]

DEFAMATORY AND DISPARAGING STATEMENTS.—According to French law, a merchant or manufacturer has the right to use every legitimate means in advertising the merits of his goods or of his establishment, but he must refrain from doing anything of a nature to injure the credit of his competitors or to disparage their business. It is not considered unfair for a person to indulge in the most extravagant claims for his own products, so long as he does not refer to a competitor disparagingly.[4]

In order to constitute an act of unfair competition disparaging statements must be publicly made. A statement made confidentially or privately by one person to another would not afford ground for an action.[5] Disparaging statements which do not mention a com-

[1] Paris, 1août 1901, Amieux et Comp. c. La Laiterie du Nord; Dalloz. op. cit., 1903, II, p. 157.

[2] Paris, 8 juin 1904, Marius Dubonnet c. Mercier; Annales 1904, p. 355.

[3] Grenoble (1 ch.), 26 juin, 1912, J. Simon et Cie. c. Schicklé; Annales 1913, p. 344.

[4] Pandectes Françaises, tome 20, p. 72; Pouillet, op. cit., p. 959.

[5] Pouillet, op. cit., p. 966.

petitor or his products or establishment by name may nevertheless be considered unfair competition if the allegations or insinuations are of a nature to cause injury to another. Such is the case when the public might easily understand to whom the statements refer or when the statements relate to all those who manufacture in a given locality or follow a special method or process.[1] The circulation of statements that are true may also constitute unfair competition if done with the intent to injure.

The cases cited below illustrate various forms of disparagement and show the manner in which the courts have dealt with them.

The Morning News, an English newspaper published in Paris, inserted in several numbers some tables comparing the number of copies sold by it with the number sold by another English paper published in Paris, making prominent the smaller number sold by the latter. The court declared the act to be unfair competition and awarded damages to the plaintiff.[2] In part, the court said:

> The act by the director of the Morning News of using the name of Galignani's Messenger, whether in the said tables or in the different articles, for the purpose of disparaging the journal which bears this name constitutes an abuse and an act of unfair competition, injurious to the plaintiff, which it is proper to bring to an end.

A druggist distributed in the neighborhood of the shops of his competitors a prospectus containing the notice "Before calling on your regular druggist consult this price list in the interest of your pocketbook and your health." The court declared this to be unfair competition.[3]

The Mutual Life Insurance Co., a New York corporation, and the manager of its branch office at Paris, while waging a competitive campaign against the French life insurance companies, circulated several prospectuses criticizing the management and results of operations of these companies, especially the Compagnie d'assurances générales. In one of these prospectuses it was stated that the general expenses of this French company were twice those of the Mutual. In another it was stated that the French company was run in the interest of its shareholders and not its policyholders. Elaborate statistical calculations based on the financial reports of the companies compared were presented in support of these charges. The Mutual also reprinted and circulated, with the consent of the author, a document by a French writer, which tended to show that the French company had conducted its life insurance business at a loss in 1891 instead of at a profit.

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[1] Pouillet, op. cit., pp. 966, 976.

[2] Trib. comm. Seine, 21 mai 1884, Galignani's Messenger c. Morning News; Annales 1885, p. 119.

[3] Trib. comm. Melun, 11 déc., 1906; Baillet, Boudier et autres c. Crestey; Annales 1907, II, p. 46.

Suit to recover damages was brought against the Mutual by the French company especially attacked in these prospectuses. It was shown that the calculations used to support the various disparaging statements circulated by the Mutual, whether intentional or not, were erroneous. The court held the acts of the Mutual to be unfair or unlawful competition in the sense of articles 1382 and 1383 and awarded damages. The contention of the defendants that they were only retaliating against attacks of their competitors was rejected.[1] In respect to the right of merchants to disparage rivals or their products the court made the following statement:

> The privilege which belongs to every merchant to praise his products in terms, the propriety of which, as a general principle, it is not for the tribunals to determine, does not confer on him the right to attack a competitor or to disparage or to depreciate the articles which he exploits, even by the way of simple comparison, with the aim of diverting the clientele to his own profit. * * * The tribunals are not required in principle to ascertain whether the criticisms formulated by a merchant against his competitor are well founded.

A gunsmith exposed in the window of his shop a fowling piece with a cracked barrel bearing the placard: "Fracture of a St. Etienne gun barrel by a single 4-gram cartridge, casting doubt upon its resistance." The manufacturer whose product was thus disparaged brought suit and the court ordered reparation to be made.[2]

The firm of Jules Mumm & Co., dealers in champagne, addressed a circular letter of an alleged confidential nature to their agents for distribution to their clientele, to which was appended a table containing in the first column the names of certain houses, especially that of the plaintiff, together with the dates of their foundation, and in a second column opposite, the similar names of older houses, the purpose of the circular and table being to warn customers that the concerns in the first column were worthless and were intended only to profit from the reputation of the older houses, including that of defendant, by means of confusion resulting from similar names. The court held this act to be unfair competition and awarded damages.[3] The court said in part:

> Although it is lawful for every merchant in his circulars to praise the products of his establishment or the establishment itself, on the other hand he is absolutely prohibited from disparaging therein those of his competitors, especially in designating them by name and in terms susceptible of injuring them.
>
> These acts constitute a grave wrong (faute grave) and an act of unfair competition which has caused the house of Léon Chandon (plaintiff) considerable injury.

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[1] Paris, 23 juin 1896, Compagnie d'assurances générales c. Mutual Life, Baudry et Bézlat d'Audibert; Annales 1897, pp. 30, 32.

[2] Trib. comm. Seine, 27 juin 1907, Chambre syndicale des fabricants d'armes de Saint Etienne c. Pigeon; Annales 1908, II, p. 86.

[3] Trib. comm. Reims, 9 sept. 1904, François c. Jules Mumm et Cie.; Annales 1910, pp. 175, 177.

A manufacturer of cigarette paper affixed to his wall a poster in which he announced:

> The name of my paper (Guerre à Job) indicates that it is by no means an imitation of the "Job" paper that I attempt to-day and that I desire fairly to compete with it. * * * I am, then, far from having the thought of adding another name to the already lengthy list of those who have sought to imitate the paper of M. Bardou. On the contrary, I demand only that my paper be not confused with his. The real superiority of my paper, generally recognized, gives me assurance that my brand "Guerre à Job" will soon be preferred by all amateurs. * * * It is the real merit of the paper that must be sought for and will be found in my new brand, which shall soon be known to all as the best product that exists.

The court held it to be an act of unfair competition for a merchant in his advertisements and prospectuses to mention a competitor and his products with the intent to disparage them, and enjoined defendant from a further use of the word "Job."[1]

A proprietor of a café in Paris by the name of Maumus posted the notice in large letters: "The Café of Maumus does not serve Byrrh." The exclusive proprietor of the brand "Byrrh" brought suit for damages. The court held that Maumus had acted in good faith and within his rights in informing the public that he did not serve this drink. Upon appeal this decision was affirmed.[2] The court of appeals said, in part:

> It is certain that Maumus only made use of an incontestable right, that of not selling any byrrh and of informing his customers to that effect. The normal exercise of this right could not be legally injurious (to plaintiff) since it must be admitted that aside from the conspicuous notice, no unlawful facts could be set forth, such as malicious remarks, utterances, acts, or writings of a nature to usurp or depreciate the product known under the commercial name of byrrh.

A manufacturer inserted in a circular letter the statement that the superphosphates which he offered to the public were the only ones which were absolutely perfect in respect to certain qualities, such as fineness, freedom from moisture, etc. No criticism, however, was made of the products of other manufacturers. The court held that it was not unfair competition for a person to proclaim his goods as the best in the world and much superior to similar goods, so long as he makes no mention nor criticism of the products of rival and competing houses.[3]

A periodical offered to sell to subscribers as a premium a certain make of gun for 85 francs, which, it stated, was equal in value to those sold by the dealers for 125 francs. One of the dealers then announced in the papers and by placards and circulars that he had always sold for 78 francs the same guns offered as a premium by the

[1] Paris, 23 avril 1869, Sabatou c. Bardou; Dalloz, op. cit., 1870, II, p. 75.
[2] Pau, 18 juin 1897, Lambert-Violet c. Maumus; Dalloz, op. cit., 1897, II, pp. 335, 336.
[3] Toulouse, 18 janv. 1906, Organ c. Compagnie Bordelaise; Annales 1907, II, p. 2.

periodical for 85 francs. Suit was brought by the manager of the periodical to recover damages on the ground that the statement circulated by the defendant was an act of unfair competition. The statement appears to have been true. The court, however, held that, by clearly giving the impression that instead of being a concession in price the offer of the plaintiff was only a lure and a source of profit to him, the defendant had committed an act of unfair competition. Damages were, therefore, awarded.[1]

PRICE CUTTING.—In general a retailer in France has the right to sell his goods at any price he chooses, and even at a loss, unless he has entered into an agreement to the contrary. When, however, price cutting takes place under such conditions as to show a clear intention to disparage or depreciate the value of another's goods it may constitute unfair competition.[2]

Agreements to maintain fixed resale prices are regarded in France as legal and binding, and the merchant who cuts the resale price after entering into such an agreement is held to have committed an unlawful act, as well as an act of unfair competition, against those of his competitors who keep their agreements. Such agreements to maintain resale prices are binding only upon the parties to the agreement. A manufacturer or distributer, except as noted above, has no ground for action against a merchant who cuts prices if he has not entered into a contract to maintain them.[3]

The following cases will illustrate these principles:

Defendants offered to sell some tooth wash below cost. The manufacturers brought suit against them on the ground that the cut in price and the announcement of it was an act of unfair competition of a nature to depreciate their product.[4] In rejecting this contention the court stated the principle applying to such cases as follows:

> One can not contest the right of a purchaser to advertise and resell at whatsoever price he chooses the merchandise which he has purchased and paid for when the seller has made no reservation which would take away this privilege from him.

A dealer in perfumery entered into an agreement with the manufacturer not to sell nor allow to be sold nor mark or catalogue the products of the latter at prices below those fixed as the minimum. Failing to keep this agreement the dealer was sued for breach of contract. The court sustained the right of the manufacturer to sell his goods subject to such conditions as he might impose upon the purchaser.[5]

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[1] Besançon, 24 nov. 1880, Damelit c. Moulin; Annales 1882, p. 258.
[2] Pouillet, op. cit., p. 988; Allart, op. cit., p. 221; Pandectes Françaises, tome 20, p. 78.
[3] See Annales 1910, I, pp. 71–73.
[4] Paris, 2 déc. 1869, Lamoureux et Chouet c. Calame et Fleck; Annales 1870, p. 60.
[5] Trib. comm. de Rouen, 17 janv., 1906, Javal et Parquet c. Brunschwig; Annales 1906, p. 97.

The Société des Eaux minérales de Vittel distributed to the trade a circular, as follows:

We have the honor to inform you that we have regulated the sale of our Vittel waters * * * at a minimum price of 70 centimes per bottle for sale to the public.

We have joined the regulative union for this purpose, and that no one may plead ignorance have placed on our own label the stamp of this union, which from now on will be accompanied with the following notice: "The stamp in the margin imposes upon the seller the obligation to conform with the fixed minimum price."

We place thus upon our waters, as it is our strict right, an obligation which we intend henceforth to enforce upon all resellers without exception.

In consequence the act of buying our Vittel waters and reselling the same to the public constitutes for the seller an absolute obligation of not selling to the public at less than 70 centimes per bottle.

The society brought suit against a certain Brunet for selling below the fixed price. It was proved that Brunet bought the bottles not from the plaintiff but from a dealer who had not imposed any obligation upon Brunet regarding a minimum resale price. The court refused to consider the notice on the label as binding upon dealers to maintain the price noted thereon, and accordingly held that since no contract existed between the parties Brunet was free to resell his goods at prices that suited him.[1]

DECEPTIVE ADVERTISING.—In France every merchant has the right to attract custom by advertising his goods. Such an act constitutes unfair competition only when the announcements contain misleading statements which are intended to deceive the public and thus by fraud to divert customers from competing establishments.[2] The following cases illustrate the principles established by the courts:

A merchant opened in a city a store for the sale of ready-made clothing, and by means of posters, newspaper advertisements, and prospectuses announced that the goods put on sale came from a burned warehouse and were sold for the account of the insurance company at from 50 to 80 per cent reductions, when in fact the goods had not been in a fire and were not sold at a cheap price or loss, but only at their real value. Suit was brought by a competing firm of merchant tailors. The court held that the merchant had knowingly deceived the public in order to acquire the clientele of his rivals, that the acts exceeded the limits of permissible advertising and constituted unlawful, misleading, and fraudulent tactics, such as are characteristic of unfair competition. Damages were awarded and judgment was affirmed upon appeal.[3]

[1] Trib. comm. Seine, 13 nov. 1909, Société des Eaux minerales de Vittel c. Brunet; Annales 1910, I, 77.

[2] Pandectes Françaises, tome 20, p. 70.

[3] Orléans, 29 mars, 1889, Beauvois, dit Demonchaux c. Chollet et Courel; Sirey, Recueil Général des Lois et des Arrêts, 1889, II, p. 93.

Two merchants announced the sale of a bankrupt stock as comprising 500,000 francs' worth of merchandise, which, as liquidators, they were selling at 75 per cent loss, when, in fact, they had purchased less than 12,000 francs' worth of goods from the bankrupt stock of another and were selling the goods at little less than real value. A competing concern brought suit. The court held such an act to be unfair competition, and ordered the defendants to omit the misleading statements from their announcements.[1]

By agreement a merchant, Lévy, took over the business of Tarnaud, a dealer in novelties at Tours, who had been declared bankrupt. He then announced in the papers that on a given date the large stock would be liquidated with enormous reductions, imitating the usual manner of advertising liquidation sales. By other means also he led the public to believe that he was selling out the business instead of continuing it, and that the sale was a forced sale of the particular stock, when, as a matter of fact, he added considerable quantities of goods from other sources to the pretended bankrupt stock. The court declared that this was unfair competition, and awarded damages to two competitors in the town who had been injured by the diverting of their customers.[2]

USURPATION OF TITLES.—The use by merchants of certain qualifications or titles which they think might recommend their establishments or their products to the public is, in general, permissible in France, but the unauthorized or fraudulent use of such designations to create a favorable impression in the minds of the public is held by the courts to constitute unfair competition against honest merchants. The most common acts of an unfair kind are those in which merchants falsely claim to be the former pupil, former employee, or former associate of a well-known house; also those in which persons falsely announce themselves to be the depositaries or sole depositaries of certain goods, or manufacturers announce falsely that they are the only manufacturers of certain goods or that their goods are the only ones receiving an award at a certain exposition.[3]

The use of such titles as former pupil, ex-employee, etc., in a manner to create confusion between two establishments, is always regarded as unfair competition, affording ground for a civil action (see p. 572); but there is still a wide difference of opinion as to whether the bona fide use of such titles can constitute unfair competition.[4]

The misappropriation or misuse of awards of expositions and other honorific distinctions of the same character is made a penal offense under the law of 1912 (see p. 568).

[1] Trib. comm. de Rouen, 4 juin 1877, Lévy, Jacob et Legrand c. Francfort et Kahn; Annales 1877, p. 258.

[2] Orléans, 9 déc., 1891, Lévy c. Saintin et Flisseau; Sirey, op. cit., 1892, II, p. 202.

[3] Pandectes Françaises, tome 20, pp. 71, 79.

[4] Pouillet, op. cit., pp. 851, 852.

A few cases involving the false assumption of titles follow:

A book dealer in Châlon-sur-Saône announced in a newspaper that he was the sole dealer handling a certain publication. Another book dealer in the same city, who handled this publication, brought suit for damages. The publisher testified that he had no sole depositary in that city. The court held therefore that the other book dealers had just cause for action against the defendant.[1]

The act of a merchant in distributing to the public some prospectuses of a certain house, after having them marked with his stamp, with the intention of making the clientele believe that he was the depositary of this house when in fact he was not, was held by the court to be unfair competition.[2]

A horticulturist claimed to be the sole producer of Argenteuil asparagus in a certain locality, when in fact there was another who for a long time had been engaged in growing this same kind of vegetable. The tribunal ordered the suppression of the word "sole" in the prospectuses, announcements, invoices, letterheads, etc.[3]

A clothing manufacturer opened an establishment at Blois under the trade name "A la Belle Jardinière," which was the name of a well-known house in Paris, but he took care to add to this designation his own name as well as the name of the place in which he was located, so that confusion between the two concerns in violation of the law of 1824 was impossible. He had, however, placed a sign in large letters in his display rooms located just across the street from his main establishment, which read "Branch of la Belle Jardinière," while on the show window in very small letters was placed the notice, "The entrance of the store is opposite." He had also distributed cards and inserted advertisements in the newspapers so worded as to convey the impression that his shop was a branch of the Paris concern. The court held such acts to be of a nature to cause injury to the Paris house and ordered the defendant to discontinue the use of the word "branch."[4]

DISCRIMINATION AGAINST A COMPETITOR.—Favoring a person to the detriment of his competitors may constitute an act of unfair competition according to French law. A common form of such discrimination is to omit or obscure the name of a competitor in a general directory or publication of similar nature which purports to give all the concerns engaged in a given line of business. Another practice of similar nature is to place a person's advertisement in a more favorable

[1] Dijon, 13 août 1860, Mulcey c. Boyer; Annales 1861, p. 25.
[2] Nancy, 20 avril 1899, Soc. la Française; cited by Pouillet, op. cit., p. 809.
[3] Paris, 14 déc. 1888, Lhérault c. Lebeuf; Annales 1891, p. 262.
[4] Cass. civ., 17 janv., 1894, Bessand, Blanchard, Rochard et Cie. c. Godard; Sirey, op. cit., 1894, I, p. 433.

position with respect to those of his competitors than he is entitled to have. A few cases follow:

The courts have held it to be unfair competition for the proprietor of a steamboat service to publish and distribute a booklet with the title "General Directory of Steamboats between ——— and ———," from which he intentionally omitted the name of a rival enterprise operating over the same course.[1]

A certain manufacturer contracted with the publishers of an annual business register for 32 pages of advertising space. Two former employees of his were allowed to deprive him of a part of this space for the purpose of injuring him. The court held the act to be unfair competition, enjoined the further suppression of his advertisements, and awarded damages.[2]

The merchants of Commentry published an almanac for the year 1899, called "Almanach de Commentry," containing their addresses and businesses in the advertising columns. One of the merchants, a grocer, bought 200 copies, which he distributed gratis among his customers, after having pasted together pages 40 and 41, which contained the advertisement of one of his competitors. The court held this to be unfair competition and awarded damages.[3]

The manager of a telephone company caused to be printed after the name of a subscriber the name of one of the latter's competitors in the form of an advertisement instead of placing it in its proper alphabetical order. The court held this to be unfair competition.[4]

Corrupting employees.—The corrupting of the employees or workmen of a competitor constitutes unfair competition if done with the intention of securing his factory or trade secrets or of diverting his clientele.[5] But it is not unlawful to secure the services of a competitor's workmen by offers, promises, etc., if there is no intention to obtain his trade secrets or to divert his clientele, or if no breach of contract for hire is involved. The following decisions will illustrate the view of the courts on this point:

A proprietor of a bakery tried to corrupt some employees of a competitor in order to procure his secrets of manufacture as well as the names and addresses of his customers. He also distributed circulars claiming that he had been formerly associated with the founder of his competitor's establishment and that he had secured the head man and all the personnel of this founder and that his competitor would close his shop within two years. The court held these acts to be unfair competition in the highest degree and

[1] Rennes, 4 juin 1883; cited in Pandectes Françaises, tome, 20, p. 71.
[2] Trib. comm. Seine, 9 juin 1876, Ramé c. Besland et Galempoix; Annales 1877, p. 47.
[3] Riom, 28 mars 1900, Bougerolle c. Guillot; Annales 1901, p. 158.
[4] Paris, 20 nov. 1912, Revue Trimestrielle de Droit Civil, 1913, p. 184.
[5] Pouillet, op. cit., p. 1023.

awarded damages. The plaintiff in this case sent circulars to his customers replying to the claims of the defendant, which circulars contained some incorrect statements regarding the latter. Counter suit was brought against the plaintiff and damages recovered by the defendant.[1]

A manufacturer paid a foreman of his competitor 500 francs for the disclosure of the process of glazing copper used in the factory where the latter was employed. The foreman also assisted the manufacturer to the extent of installing in his factory the apparatus necessary to carry on the competition. Suit was brought to enjoin the manufacturer from using this process, and also to recover damages from both the manufacturer and the foreman. The court held that the process did not have the character of originality and novelty which would make it a secret of manufacture, and therefore refused to enjoin the defendant manufacturer from using it, but it declared that the act of the manufacturer in subsidizing the foreman in order to obtain the process, and the act of the latter in assisting the manufacturer to inaugurate the competition, were unfair and rendered them liable for damages.[2]

A Parisian tailor, by offering a higher salary to a forewoman of his competitor and also by agreeing to pay all costs falling upon her in case of prosecution, induced her to break her contract for hire of services and to sign a contract with him. The competitor brought suit against him for damages. The court held that, in aiding an employee of a competitive house to break her contract by promising to take care of all pecuniary consequences thereof, the defendant had committed a wrong for which the plaintiff could justly demand reparation. Upon appeal the highest court confirmed the judgment, holding that the acts of defendant exceeded the rights of free competition and constituted an offense of a nature to render him liable.[3]

An industrial concern, upon opening a new branch, hired two employees of a rival establishment, one of whom was experienced in the manufacture and the other in the sale of sewing cotton. A suit for damages was brought. The court rejected it, however, on the ground that the two employees had not violated any contractual obligations in leaving their former employers and the defendants had not committed any reprehensible act of competition in hiring them.[4]

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[1] Douai, 30 janv. 1912, Petit c. Paquin; Annales 1913, p. 80. This decision is regarded as important by the Annales in that the court seems to admit that it is lawful for a person to defend himself against the injurious statements of others by addressing a circular letter to his customers, providing the statements are correct.

[2] Cass. rej., 28 nov. 1898, Lecomte c. Lambert et fils et Debeauvais; Annales 1899, p. 241.

[3] Cass. civ., 27 mai 1908, Doeuillet et Cie. c. Raudnitz; Dallos, op. cit., 1908, I, p. 459.

[4] Douai, 15 juill. 1887, Wallaërt frères c. Boutry Droulers; Annales 1891, p. 306.

DIVULGING SECRETS.—The divulging of the secrets of manufacture by employees constitutes a penal offense under article 418 of the Penal Code.[1] The revealing of processes of manufacture not presenting novelty or newness, which is the criterion of a secret of manufacture within the meaning of article 418, and the revealing of trade secrets other than those of manufacture are not protected by the above article. Divulging a detail of administration or a means of control purely financial or a list of customers, for instance, is not prohibited by this provision, but constitutes an injurious act, making the author liable for damages in a civil action.[2]

Article 418 relates only to the disclosure of secrets by an employee during the term of his employment. If the disclosure is made after he has ended his engagement, the act is not a penal offense, but is actionable under article 1382 of the Civil Code as constituting a disloyal act on the part of the former employee, for which damages can be claimed.

DISLOYALTY OF FORMER EMPLOYEES.—According to French law an employee, upon the termination of his engagement, while entitled to profit in every legitimate way from the knowledge and experience acquired during his employment, is under obligation not to use the information so acquired in such a way as to injure his former patron or to divert the latter's clientele. He commits an act of unfair competition, for example, if he retains a copy of the names and addresses of the clients of his former employer or other memoranda that would be useful to a rival house; also if before the expiration of his engagement he solicits the clients of his employer in the interest of the concern which he intends to establish or to join.[3]

A few cases illustrating these principles follow:

An employee who was about to leave a certain firm in order to establish a business of his own copied a part of the ledger for his own use, and also the substance of letters addressed to the firm by its clients, and, finally, on his last trip made at the expense of his employers, he reserved for himself some of the orders which he had taken until he should become established. The court held such acts

[1] Art. 418. Every manager, agent, workman of a factory who shall communicate or attempt to communicate to foreigners or to Frenchmen residing in foreign countries any secrets of the factory in which he is employed shall be punished with imprisonment from two to five years and a fine of from 500 to 20,000 francs.

In addition, he may be deprived of the rights mentioned in article 42 of the present Penal Code for not less than 5 and not more than 10 years, counting from the day on which his penalty begins.

If these secrets have been communicated to Frenchmen residing in France the penalty shall be imprisonment from three months to two years and a fine of from 16 to 200 francs.

The maximum penalty pronounced by paragraphs 1 and 3 of the present article must be applied if it is a question of the secrets of manufacture of arms and munitions of war belonging to the State.

[2] Pouillet, op. cit., p. 1169.

[3] Pouillet, op. cit., pp. 1027–1029.

to be unfair competition and awarded damages. Countersuit was brought in this case against the former employer for disparaging the ex-employee to the principal supply house and for trying to prevent the sale of raw materials to him. The court declared this act to be unfair competition, for which damages were awarded.[1]

In another case the court held that the former employees of a firm who write to the customers of that firm with whom they have been in touch in their capacity as employees, and who make use of that former position in the interest of their new employer, commit acts of unfair competition, rendering them, as well as the new employer, liable for damages.[2]

SUBSIDIZING STRIKING EMPLOYEES OF COMPETITOR.—This appears to be a rather novel form of unfair competition in France. The first important case occurred in Paris in 1913. The mechanicians of several taxicab companies went on a strike, as a result of which only about one-fourth of the number of taxicabs normally in service continued running. The proprietors of those taxis still in service subsidized the strike committee, thus prolonging the strike to their profit. The plaintiffs claimed that this was unfair as well as unlawful competition. The defendants maintained that the strike was lawful, and therefore, to aid it with funds could not be regarded as unlawful. The court rejected this argument, holding the acts to be at least unlawful if not unfair, and submitted the case to a referee to confirm the facts and ascertain the amount of damages. Upon appeal the lower court was sustained. The Court of Appeal of Paris said, in part:

> If the intervention in a labor strike by workmen belonging even to different unions * * * is, in principle, lawful, and can not expose its authors to any action at law, it is on the express condition that this intervention take place without recourse to any unfair or unlawful procedure; a further condition is imposed upon the merchant or manufacturer whose competitor is the victim of the strike, namely, that of not favoring or encouraging in any way a cessation of his competitor's work in order to derive profit thereby; the rules of fairness in business are imperative on this point; to violate them is to commit a wrongful and reprehensible act which can give occasion for a suit for damages.

The court in this case did not inquire specifically as to the existence of wrongful intent, an essential element of unfair competition, but adopted the convenient phrase "the wrongs set forth constitute acts of competition at least unlawful if not unfair."[3]

IMPLIED OBLIGATION NOT TO REENTER BUSINESS.—An agreement entered into between an employer and his employee or between the

[1] Cour de Lyon, 29 juin 1904, Geoffray, Jacquet et Guillermain c. Maurage; Annales 1905, p. 34.

[2] Trib. civ. Seine, 30 juin, 1913, Massiot c. Baudin; Annales, 1914, p. 27.

[3] Paris, 9 mai 1913; Faivre et autres c. Soc. Française des Automobiles de Place; Annales, 1914, pp. 10, 17.

seller of a business and the purchaser or between an associate and his coassociates not to engage in a similar business is legal in France if not unlimited in respect to time and space.[1]

In the absence of such agreements former employees are under no obligation to refrain from engaging at any time in a similar business in the same locality (see p. 585). In the case of the sale of business establishments, especially retail stores, however, the seller is obligated not to reestablish within a certain time or within a given locality, even if the bill of sale carries no clause to this effect. The sale of a business is understood to include not only the tangible property, but also the clientele and good will. Therefore should the seller reestablish himself immediately and draw to himself the whole or a part of his former clientele he would violate article 1625 of the Civil Code, which requires that the seller must deliver what he has contracted to sell, and he would also commit an act of unfair competition against the purchaser, who is apt to lose his clientele.[2]

In case the seller reserves the right to reestablish himself or reestablishes outside the sphere of activity of his former establishment he must refrain from all unfair means of competition, such as writing to his former customers.

The following cases will illustrate the attitude of the courts on this question:

The Dupont Co., at Périgueux, published a paper under the name l'Echo de la Dordogne. Upon the dissolution of the company the liquidator made an appraisal of the property, in which he did not place a definite value on the name, clientele, and good will, but, nevertheless, took care to set forth their importance. It was shown that the purchaser of the property in considering the price also gave due consideration to these factors, and especially to the fact that there was no other paper of this kind in the place. After the sale of the paper to plaintiff one of the former associates started a rival journal, to which he gave a similar name and which he pretended was a continuation of the earlier one. He sent copies to the former clientele and invited their subscriptions and resorted to various other practices injurious to the former publication. The Tribunal of Commerce ordered a cessation of the publication of the rival journal and awarded damages. Upon appeal the court of Bordeaux affirmed the decision, declaring in part as follows (p. 283):

> The sale or transfer of an industrial establishment with the clientele and the good will has as a result, in the absence of an agreement to the contrary, the prohibition of the seller or assignor from exercising a similar industry in the neighborhood or in the sphere of activity of the establishment sold.
>
> In the case of a voluntary sale or transfer the prohibition results from the very nature of the contract by application of article 1625 of the Civil Code.

[1] H. Allart, op. cit., p. 260; Pouillet, op. cit., p. 912.
[2] H. Allart, op. cit., p. 267; Pouillet, op. cit., p. 912.

The court held, however, that in the case of a voluntary or forced auction sale the associates are bound only by an agreement not to reestablish, but such an agreement existed in this case, although disputed by defendant.

The case was again appealed. The court of cassation confirmed the decisions of the lower courts, holding that the above agreement, which was unlimited as to time but limited to the Department of Dordogne, was legal and binding upon the defendant.[1]

A grain merchant sold his business and moved to another town. After several years he opened a competing establishment in the neighborhood of the one he had sold. The court held that while the seller of a business, after a number of years sufficient to permit the purchaser to definitely attach to himself the clientele, can establish in the same town a similar business, he can not establish himself in the immediate neighborhood of the former establishment with the intention of competing against the new owner.[2]

Section 4. Belgium.

INTRODUCTORY.—The laws of Belgium respecting unfair competition are similar to those of France. Several special laws, especially the patent law of May 24, 1854, and the trade-mark law of April 1, 1879, contain provisions prohibiting certain unfair acts. Several provisions of the Penal Code are also applicable to such cases, especially article 191 relative to the usurpation of trade names, and article 309 relative to the divulging of secrets of manufacture. All unfair acts not covered by these special provisions are prosecuted under the general provisions of law contained in articles 1382 and 1383 of the Civil Code, which are the same as the corresponding articles of the French Civil Code.

In 1914 a bill for a special law against unfair competition was under consideration by the Belgian parliament, but apparently was not adopted. The Government's bill was presented November 12, 1912.[3]

PENAL CODE.—The use of trade names, firm names, and names of organizations to distinguish products is protected by article 191 of the Penal Code which corresponds closely to the French law of 1824. (See p. 560.) The language of this article is as follows:

ART. 191.—Whoever shall affix to manufactured articles or cause to be affixed to them by addition, curtailment, or by any alteration whatever, the name of a manufacturer other than the one who is the producer or the firm name of a

[1] Bordeaux, 9 fév. 1885; Cassation, 16 mars, 1886, Laporte c. Paul Dupont fils; Annales 1886, p. 275.

[2] Trib. civ. Lannion, 9 juin 1908; Henri Morvan c. Société Morvan frères; Annales 1908, II, p. 87.

[3] Verhandlungen der Mittel-Europäischen Wirtschaftskonferenz in Budapest, 1914, S. 305.

factory other than that of the manufacture shall be punished with imprisonment from one to six months.

The same penalty shall be pronounced against every merchant, middleman, or retailer who shall knowingly put on sale or put into circulation articles marked with substituted or altered names.

It will be noted that this article omits the names of places of manufacture which are protected by the French law of 1824.

Article 309 of the Belgian Penal Code of 1867 prohibits the divulging of secrets of manufacture by employees. It makes an important advance over article 418 of the French Penal Code in that an employee may be prosecuted criminally for divulging secrets even after his employment has ended. The language of this article is as follows:

ART. 309. Anyone who maliciously or fraudulently communicates the secrets of the factory in which he has been or is still employed shall be punished with imprisonment from three months to three years and a fine of from 50 to 2,000 francs.

It is required that the divulging of secrets be maliciously or fraudulently made. An accidental disclosure would not constitute a penal offense. The secrets of commerce are not protected by this article but by the general jurisprudence under section 1382 of the Civil Code.[1]

TRADE-MARK LAW.—The trade-mark law of April 1, 1879[2] is very similar to the French law of 1857. Article 1 provides that every sign serving to distinguish the products of industry or the objects of commerce can be considered as a trade-mark of manufacture or commerce, including personal names, firm names, and names of industrial and commercial organizations, if in a distinctive form. Article 2 provides that in order to obtain the exclusive use of such trade-marks a person must deposit a model in triplicate and a stereotype plate of the trade-mark with the registrar's office of the tribunal of commerce in the district in which his establishment is situated. Such registration is optional.

Articles 8, 9, and 10 provide the penalties for counterfeiting trade-marks. Article 8 is as follows:

ART. 8. Those are punished with imprisonment from eight days to six months or a fine of from 26 to 2,000 francs or both:

a. Who have counterfeited a trade-mark and those who have fraudulently made use of a counterfeited trade-mark;

b. Who fraudulently have affixed to or by addition, curtailment, or any alteration whatever have made appear on the products of their industry or the objects of their commerce a trade-mark belonging to another;

c. Who have knowingly sold, put on sale or in circulation, products bearing a counterfeit trade-mark or one fraudulently affixed.

Article 9 provides that anyone who assists in any manner the accomplishment of the misdemeanors mentioned in article 8, or who directly causes these misdemeanors, by gifts, promises, threats, abuse

[1] Moreau, Traité de la concurrence illicite, Bruxelles, 1904, p. 166.

[2] Loi de 1er avril 1879, concernant les marques de fabrique et de commerce.

of authority or power, machinations, or other culpable artifices, shall be punished with the penalties prescribed in that section. Article 10 provides heavier penalties for a second offense if committed within five years from the first offense.

GENERAL PROVISIONS OF THE CIVIL CODE.—The acts of unfair competition in Belgium which are actionable under the general provisions of articles 1382 and 1383 of the Civil Code are as varied in form as in France. The Belgian courts frequently cite as precedents the French decisions and vice versa. Important classes of such acts, in addition to those intended to cause confusion between rival establishments or products, are (1) circulating defamatory or disparaging statements regarding a competitor; (2) cutting resale prices under certain conditions; (3) corrupting and enticing the employees of a competitor; and (4) being disloyal to a former employer. The purpose of all such acts is to divert a competitor's clientele, to drive him out of business, or in other ways to injure him. They give rise to civil actions to enjoin the unfair practices and to recover damages under article 1382 of the Civil Code. According to a recent decision of the courts, an action for unfair competition has three distinct and necessary elements: (1) An act of competition contrary to fairness in business; (2) a prejudice to one of the parties; and (3) a relation of cause and effect between the first two elements.[1]

Defamatory and disparaging statements.—The principles applying to cases of disparagement in Belgium are substantially the same as those developed by French jurisprudence. It is not necessary that a rival establishment be referred to by name.[2] Reference to a certain class of manufacturers, or implications of such a nature that the particular establishment or product disparaged can readily be inferred, may constitute unfair competition. The circulation of true statements may also constitute unfair competition when done for the purpose of causing injury. A few decisions will illustrate the principles involved in such cases.

A merchant had printed on blotters which he used for advertising purposes a warning to the public to avoid appendicitis by using the granite ware which he sold in his store. He also published an article in a journal to the effect that medical authorities agreed that in three-fourths of the cases of appendicitis it was caused by chips of enamel which were carried into the digestive system by the use of enameled cooking utensils. The court held these acts to be unfair competition and awarded damages.[3] The court said, in part:

Although each manufacturer is free to praise his products and even to exaggerate their qualities, it is not permissible for him to disparage the products

[1] Bruxelles, 11 nov. 1910, Becker et consorts c. Helman; La Jurisprudence Commerciale de Bruxelles, 1911, p. 19.

[2] Moreau, op. cit., p. 187.

[3] Trib. comm. Liége, 10 nov. 1903, Société des Usines Aubry c. Bebelman; Annales 1903, pp. 334, 335.

of a competing and similar manufacture; * * * the action is admissible if it is true that the defendant while recommending his own products has disparaged those of his competitors without even indicating the names of the competing manufacturers.

In another case the defendant had distributed certain printed circulars attacking in a bitter fashion plaintiff's firm as well as one of them personally and disparaging its products. The court held that, even were it established that the allegations contained in this circular were true in whole or in part, nevertheless defendant had exceeded his right in giving these revelations a publicity which had no other aim than to injure a competitor and had, therefore, committed an act of unfair competition.[1]

A merchant sold in Belgium cigarettes wrapped in a different colored paper than that used by the French régie, or Government monopoly, but bearing the following notice:

Cigarettes compounded and manufactured according to the French processes. N. B.—No cigarette of reasonable price can come from a foreign country because the duties are too high; to say the contrary is to deceive the purchaser.

The court held this to be an act of unfair competition against the French tobacco monopoly.[2]

A gas-generator concern published a circular in which they reproduced a letter which purported to have been addressed to them by one of their customers and which stated that the expense for repairs of defendants' gas generator was nothing in comparison with that of the T—— gas generator, which had been replaced. The court held that, since the names of but three systems of gas generators commenced with the letter T, and in view of the fact that the gas generator of the plaintiff was so well known, a part of the public would certainly think plaintiff's apparatus was referred to in the circular and that the defendants, in thus making a comparison between their own apparatus and that of the plaintiff and in criticizing the product of a competitor, had committed an unlawful act.[3]

Price cutting.—Belgian courts follow in general the same principles as the French courts in dealing with the question of price cutting. They inquire (1) whether the cutting of prices is accompanied by acts intended to depreciate the value of the product and (2) whether it is done in violation of an express agreement to the contrary. Apparently, the courts pay less attention to the question of the fairness of the means employed to procure trade-marked goods sold at reduced prices than the German courts. A few cases will illustrate the application of article 1382 to cases of this kind.

[1] Gand, 3 mars 1911, Verhelst et consorts c. Denys et consorts; Pasicrisie Belge, 1912, II, p. 5.

[2] Bruxelles, 3 juin 1909, État Français c. B—; Pasicrisie Belge, 1910, II, p. 100.

[3] Trib. comm. Bruxelles, 7 dec. 1912, Wilford c. E et B; La Jurisprudence Commerciale de Bruxelles, 1913, p. 151.

A certain concern was sued by a manufacturing company under article 1382 on the ground that it had advertised a commodity in 14 newspapers of the country at a price below that paid by it to the said manufacturing company. There was also evidence to show that when customers inquired for the said commodity the defendant concern declared that it had sold out its stock and offered instead a similar article which it recommended as superior. The court held that the mere sale of a commodity below the purchase price was unobjectionable, since each one is free to dispose as he sees fit of that which he has legitimately acquired, but such advertisement of a standard article at less than half the regular price when defendant did not have a stock on hand sufficient to meet the demand tended to create a bad reputation to the injury of another merchant and also to prejudice the custom of the manufacturing company by conveying the impression that defendant had been granted unusually favorable terms. The defendant concern was, therefore, ordered to pay damages and the cost of publishing the judgment of the court in the same 14 newspapers.[1]

Defendant, a retailer, made a verbal contract with plaintiff, a manufacturer, not to sell his kind of little cigars below the price fixed by the latter and marked on the box. It was shown that defendant had broken this contract. The court awarded damages to the plaintiff.[2]

Defendant sold some little cigars below the price marked on the box. The notice on the box also stated that anyone not maintaining this price, or, while maintaining the price, depreciated the article by giving premiums, would be prosecuted. There was no contract between the parties to the suit or between the defendant and the distributor to maintain prices. The court held that in reducing prices defendant had not committed an unfair act against the manufacturer.[3]

A retailer sold Pall Mall cigarettes at Antwerp and Brussels below the price indicated on the outside wrapper of the boxes. He had not entered into any contract to maintain prices. The court decided, therefore, that he was not guilty of unfair competition against the manufacturer, holding that the right of the merchant to dispose of his goods as he sees fit is absolute if they have been legitimately procured, that the notice on the goods that they can not be sold below a certain price does not impose upon them a condition which should be transmitted with them, and that, while the seller can bind the purchaser not to resell below a certain price, and this legal contract is obligatory for the one who makes it, it does not bind others than the

[1] Tribunal de Commerce de Bruxelles, 21 mars 1905, Soc. Napoléon Rinskopf c. Soc. Cohn-Donnay et Cie. et al.; Pasicrisie Belge, 1905, III, p. 303.

[2] Liége, 13 juill. 1912, Larose c. Tinchant; Pasicrisie Belge, 1912. II, p. 336.

[3] Liége, 26 juill. 1910, Tinchant c. Duchateau; Pasicrisie Belge, 1910, II, p. 367.

contracting parties. The court further held that the defendant had committed no unlawful act, since it was not alleged that by conniving with certain purchasers he had obtained from them the goods at prices permitting him to resell at a profit below the fixed prices, causing them in his personal interest to break their contract with plaintiff, nor had he done anything to discredit the products.[1]

A similar action was brought against the defendant in the above case for selling the "Petit Larousse illustré" dictionary below the price fixed by the publishers. It was shown that the plaintiffs had refused to deliver their books to defendant, because he would not agree to maintain the price, and that in spite of this defendant had procured indirectly a large number of copies which he sold below the fixed price. The court of appeal did not consider how the defendant procured the books, but decided that he had not committed an act of unfair competition in cutting the resale prices, since he was not bound by any contract.[2]

An association of manufacturers of pharmaceutical products sought to maintain a fixed price by various tactics, such as refusing to deliver to dealers not parties to the agreement, or delivering to them only at the price fixed for sale to the public, so that it was impossible for them to make any profit. The court held that while the manufacturer or proprietor of a product is free to sell it at any price that he chooses, or to refuse to sell it at all, and can also impose upon the purchaser the condition not to resell except at a fixed price, the concerted tactics of the defendant association were a restraint of the freedom of commerce and industry.[3]

Disloyalty of former employees.—Cases of this kind are frequent in Belgian jurisprudence, as well as in that of France. Former employees are under obligations, even in the absence of any agreement, not to use the information acquired during the period of employment in such a way as to injure their former employers. A few cases of this kind are given below.

A former employee of a company who had been in charge of its commercial correspondence established with another person a competing company, of which he became the manager. It was shown that he had used the knowledge acquired by virtue of his employment, especially regarding the names of customers and their business habits and requirements, and also regarding prices and market conditions, the methods of advertising, etc., in a manner to injure the

[1] Trib. comm. Bruxelles, 6 nov. 1911, Société Turkische Cigarette et Tabac Fabrick c. Société des grands magasins Léonhard Tietz; La Jurisprudence Commerciale de Bruxelles, 1912, p. 169.

[2] Bruxelles, 29 juill. 1909, Société en Nom Collectif Hollier-Larousse et Cie., c. L. Tietz, Société Anonyme Grands Établissements Léonhard Tietz; Pasicrisie Belge, 1909, II, p. 362.

[3] Trib. comm. Bruxelles (4 ch.), 12 nov. 1907, Gripekoven c. S.; Annales 1908, II, p. 11.

business of his former employer. The court therefore ordered him to pay damages.[1]

The former head cutter of a dressmaking establishment in Ghent opened a rival establishment and announced this opening by means of circulars containing the following reference:

> Having been for many years employed as head cutter in several large towns, and in the last place Au Louvre, in Ghent, where I remained nearly five years, the skill of which I have given proof makes me hope that the ladies will not hesitate to honor me with their confidence.

The court held for the former employer who brought suit on the ground that defendant, by circulating this announcement, had tried to solicit the customers of the plaintiff.[2] The court said in part:

> The reference to the fact of being a former employee of a competing firm always has for its aim to profit by a reputation to which the former employee has no right, and often for the sole reason of being a means of diverting the clientele, especially when the competition is established in the same locality. On every hypothesis this reference is unlawful when addressed to the customers of a former patron.

A person had the exclusive selling agency for a Dutch fashion journal in Belgium. During the 13 years covered by this arrangement this person was known in Belgium as the publisher of the journal. Before the termination of this arrangement the true publisher announced in the journal that he was the real owner. He also procured from an ex-employee of the agent a list of subscribers of the journal in Belgium. The court held this to be an act of unfair competition against the agent. A countersuit was brought in this case by the publisher against the former agent for sending out a circular to the subscribers soliciting subscriptions to a new journal of similar character, in which it was stated that for the same price they would obtain a subscription lasting twice as long. The court held that this act constituted unfair competition against the publisher.[3]

Enticing employees.—According to Belgian law, it is permissible for a competitor to hire the employees of his rival, even by the offer of advantages, higher wages, etc., and also permissible for the employees of one employer to leave him and enter into the service of a competitor, providing there is no agreement to the contrary. The hiring of a competitor's employees constitutes an act of unfair competition, however, when it has for its aim and effect to disorganize the services of a competitor or to find out his secrets of manufacture

[1] Trib. comm. Bruxelles (1re ch.), 30 janv. 1908, Société M. c. Société O. et associés; La Jurisprudence Commerciale de Bruxelles, 1908, p. 153.

[2] Trib. comm. de Gand (1re ch.), 30 juin 1906, Ledant c. Lefebvre; Pasicrisie Belge, 1907, III, p. 164.

[3] Trib. comm. Bruxelles, 15 nov., 1906, Schepens et Cie. c. Sythoff et Meeuwissen; La Jurisprudence Commerciale de Bruxelles, 1907, p. 8.

or of commerce.[1] A few cases will illustrate the attitude of the courts regarding this practice.

A manufacturer brought suit against a competitor for hiring some of his agents.[2] After stating the general principles involved in such cases, the court said:

> These principles do not go as far as to permit a manufacturer to attract to himself the agents of a competitor for the purpose either of finding out the secrets of the latter or of disorganizing his services and thus suppressing or weakening his free competition. Such acts are contrary to commercial honesty, and in every case constitute a fraud or, at least, a wrong, reparation for which is due to the one who finds himself the victim thereof.

A competitor of a certain manufacturer succeeded by means of gifts and promises in hiring several of the latter's employees who, it was claimed, were engaged in industrial processes requiring special skill. The court held that neither the act of hiring these workmen nor the act of making them gifts and promises could be regarded as unfair. It was not shown that the defendant sought to secure the secrets of manufacture or the special processes of the plaintiff; and as the defendant might have been prompted by legitimate motives, such as the desire to secure the services of more skilled or intelligent workmen, the court dismissed the suit.[3]

A proprietor of a ladies' tailoring establishment employed the forewoman and three working women of a competitor and, with their assistance, copied patterns of gowns which the competitor had bought at a Parisian shop. It was shown that the forewoman had been dismissed by plaintiff, and that the three working women had followed the forewoman without any solicitation from defendant; also that the designs were not of such an original character that they could not have been procured elsewhere, having been reproduced in certain publications. The court held that the acts of defendant did not constitute unfair competition against the plaintiff.[4]

Section 5. Italy.

Introductory.—The adjudication of cases of unfair competition in Italy follows in general the French system. Certain practices are forbidden by provisions of the Penal Code or of special laws relating to patents, trade-marks, etc., while other practices furnish ground for a civil action for an injunction or damages under section 1151 of the Civil Code.

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[1] Pasicrisie Belge, 1907, III, p. 232.

[2] Trib. comm. Bruxelles (1re ch.), 4 juill. 1898, Société Anonyme "Manufacture de Biscuits Parein" c. Société Anonyme "Victoria"; Pasicrisie Belge, 1898, III, p. 295.

[3] Trib. comm. d'Anvers (3e ch.), 27 juin 1899, Société anonyme pour l'exploitation de la machine à découper le bois c. La Société anonyme l'Aigle; Jurisprudence du Port d'Anvers, 1899, I, p. 361.

[4] Trib. comm. Bruxelles, 25 octobre 1912, Bargeaud c. H.; La Jurisprudence Commerciale de Bruxelles, 1913, p. 30.

Italy has not as yet enacted a special law against unfair competition, although such a law has been drafted and recommended by a commission called the "Royal commission for the study and proposal of reforms of the present Italian legislation concerning industrial property," which was created by a royal decree of October 8, 1906.[1]

PENAL CODE.—Section 163 of the Penal Code forbids the disclosure of secrets which cause injury. It reads as follows:

SEC. 163. Whoever by reason of his rank, office, profession, or trade gains knowledge of a secret, the publication of which may cause injury to another, and publishes the same without just cause, shall be punished with imprisonment not to exceed one month or with a fine of from 50 to 1,000 lire. If injury results, the penalty shall not be less than 300 lire.

Section 295 forbids the fraudulent substitution of one article for another.

SEC. 295. Whoever in the exercise of his own business deceives a purchaser by delivering to him one article instead of another, or an article different as regards origin, quality, or quantity from that shown or bargained for, shall be punished with imprisonment not to exceed six months or with a penalty of from 50 to 3,000 lire. If the fraud relates to precious objects, the penalty shall be imprisonment from 3 to 18 months or a fine not less than 500 lire.

Sections 296 and 297 relate to the reproduction or misappropriation of marks used to distinguish the products of another.

ART. 296. Whoever counterfeits or alters the names, marks, or distinctive signs of the works of skill or of the products of any industry whatever, or who makes use of such names, marks, or signs, even though counterfeited or altered by another, is punished by imprisonment of from one month to two years and with a fine of from 50 to 5,000 lire.

Whoever counterfeits or alters industrial designs or models or makes use of such designs or models, even though counterfeited or altered by another, is subject to the same penalty.

The magistrate may order that the sentence of condemnation be inserted in a newspaper, designated by him, at the expense of the condemned.

ART. 297. Whoever, in order to carry on trade therewith, imports into the State, offers for sale, or in any other manner puts into circulation works of skill or products of any industry whatever, with names, marks, or distinctive signs counterfeited or altered, or with names, marks, or distinctive signs apt to deceive the purchaser with regard to the origin or quality of the work or product is punished with imprisonment of from one month to two years and with a fine of from 50 to 5,000 lire.

LAW OF AUGUST 30, 1868.—The law of August 30, 1868,[2] relative to trade-marks and other distinguishing marks prohibits in section 5 the misappropriation and misuse of certain business designations, as follows:

SEC. 5. In addition to the general prohibition against usurping the name or the signature of a company or individual, it is also forbidden to appropriate

[1] Atti della Commissione reale, ecc., Vol. II, Roma, 1911, p. 575; cited in Il Diritto Commerciale, 1912, I, p. 452, and III, p. 47.

[2] Legge, 30 agosto 1868, n. 4577, concernente i marchi e i segni distintivi di fabbrica.

the commercial name or the sign of the business, the characteristic emblem, the name, or title of an association, or juristic person, either foreign or national, and to place them upon shops, industrial or commercial products, or on designs, engravings, or other works of art; even if the firm name, sign, emblem, name, or title aforesaid does not constitute part of a trade-mark or distinctive sign or should not be registered in accordance with the present law.

The court held that a certain firm which used the name "Princesse" for corsets was liable for damages to the firm Rosenthal, Fleischer & Co., who had previously acquired the trade-mark "R. F. C. à la Princesse" for a similar article, the act having been maliciously committed.[1]

Article 12 prohibits (1) the counterfeiting of trade-marks or other distinguishing signs, (2) the fraudulent imitation of trade-marks and other distinguishing signs, and (3) the sale or offer for sale of goods bearing counterfeit or fraudulently imitated trade-marks, signs, etc. The language of this section is as follows:

ART. 12. He shall be punished with a fine of not more than 2,000 lire even if there is no damage to a third party:

1. Who shall have counterfeited a trade-mark or distinctive sign or who shall have wittingly made use thereof;

2. Who shall have wittingly placed in circulation, sold or imported from a foreign country, and for commercial use, products with counterfeit marks;

3. Who shall have contravened the provisions of articles 3, 5, and 6 of the present law;

4. Who, without having actually counterfeited a trade-mark or distinctive sign, shall have made a fraudulent imitation of one, or who shall have wittingly made use of a fraudulently imitated trade-mark or sign;

5. Who shall have wittingly placed in circulation, sold, or imported from a foreign country, and for commercial use, products with a fraudulently imitated trade-mark or sign;

6. Who shall have wittingly made use of a trade-mark or sign, insignia or emblem bearing an indication apt to deceive the purchaser as to the nature of the product or who shall have sold products provided with such trade-marks, signs, or emblems.

In case of second offense, the fine shall be not more than 4,000 lire.

The trade-marks or signs counterfeited, the instruments which have served in the fraud, and not merely the products and objects accredited with such counterfeiting, shall be confiscated.

The trade-marks or signs, insignia, or emblems altered shall be restored at the expense of the offender.

These penalties are applicable without prejudice to indemnification for damages with regard to him who justly demands them and to those greater penalties which are established by the Penal Code for the case of falsification.

LAW OF OCTOBER 30, 1859.—Section 8 of the law of October 30, 1859,[2] relating to patent rights, provides that the patent on a new article comprises the exclusive right of manufacture and sale of the

[1] Corte di Cassazione, Torino, 18 novembre 1909, Mantovani e. C. c. Rosenthal, Fleischer & Co.; Il Filangieri, 1910, p. 121.

[2] 3731 Regio Decreto: inserto nella Gazz. Piem. del 3 dicembre, 1859, modificazione alla Legge sulle privative industriali del 30 ottobre 1859.

article. This provision appears to make it allowable for manufacturers of patented articles to fix the resale price and other conditions of sale. Under such circumstances the cutting of the price of patented articles fixed by the manufacturer appears to be regarded as unfair competition.

The appellate court of Torino declared it to constitute unfair competition according to section 8 of the patent law to buy goods, manufactured and patented in Italy, in a foreign country and to resell them in Italy at a lower price than that fixed by the holder of the patent or by the sole selling agent.[1]

CIVIL CODE.—Article 1151 of the Italian Civil Code contains a general provision of law applicable to cases of unfair competition similar to that found in article 1382 of the French Civil Code. The language of this article is as follows:

ART. 1151. Every act of a person which causes damage to another, obliges him by whose fault the damage has been caused to compensate for said damage.

As a result of the interpretation of this provision, its application is practically limited to cases where deceit or an unlawful act on the part of the offender can be shown.[2]

Article 1151 of the Civil Code is supplemented by article 1152, which provides that every person is responsible for the damage caused not only by his own acts, but as a result of his negligence or imprudence, and also by article 1153, which provides that every person is equally liable for injuries resulting from his own acts and for injuries resulting from the acts of persons for whom he is responsible or of chattels in his custody.

The following cases illustrate the application of article 1151 to unfair competitive practices:

Enticing customers.—The practise of drawing prospective purchasers away from a competitor was held to constitute unfair competition by a Venice court.[3] A novelty dealer, who had placed a runner in front of a competitor's shop to coax buyers away and into his own shop, was held liable for damages in an action charging unfair competition under section 1151 of the Civil Code. The court said:

As long as one of these runners, of whom the house of Pauly speaks, stands in the neighborhood of a shop in the public street, even placing himself at a show window, and remains in a purely contemplative attitude, it may be spoken of as annoyance, but not as direct offence. On the contrary, there is damage when the runner becomes active and seeks to turn the customers aside, whether by treating with them directly or by treating with the persons who accompany them.

[1] Corte d'appello, Torino, 15 maggio 1912, Consorzio Agrario Cooperativo di Torino c. Martin Cultivator Co.: Mon. d. Trib., 1912, p. 936.

[2] Ramella, Trattato della Proprietà Industriale, 1909, II, p. 372.

[3] Trib. di Venezia, 14 aprile 1904. Societa Salviati Jesurum c. Ditta Pauly e C. Rivista di Dir. Com., 1904, II, p. 468.

Every merchant has the right that anybody freely enter into his shop: this is a right which it was not necessary to write in any code, precisely because it is inherent in the liberty and in the very life of trade.

Another merchant who for purposes of competition seeks to dissuade him who by approaching has manifested the intention of entering into a shop makes an attack upon that right.

Deceptive advertising.—The owner of a hotel in the health resort Bellagio, who had distributed posters which announced that during the approaching winter season the principal hotels of the resort would be closed and that his hotel would be the only one to remain open all the year round, was held liable for damages to another hotel keeper of the same place whose hotel was also open throughout the year.[1]

Misrepresentation.—The proprietor of a hotel in Sestri Levante, where reservations had been made for a noted American, was granted damages against a competitor who had maliciously induced the traveler to become a guest at his hotel instead of the other by means of false statements concerning reservations made by representatives of the defendant hotel.[2]

Divulging trade secrets.—A lye manufacturer at Milan got judgment for damages against a competitor who offered to furnish the plaintiff's customers with the formula used by the plaintiff either at a stipulated price or in return for their agreement to buy from him for several years certain materials required by the formula.[3]

Disparaging statements.—A druggist was found guilty of unfair competition who had dissuaded others from buying at a competitor's drug store by asserting that the goods of the latter were of an inferior quality.[4]

The publication by a physician of letters purporting to come from patients as expressions of gratitude for alleged medical and surgical cures, and weaving thereinto disparaging allusions to some other physician, without naming the latter but in such a manner that the average reader knew to whom the disparaging statements referred, was held to constitute unfair competition, because thereby the honor and professional reputation of the plaintiff were prejudiced in the eyes of his patients.[5]

A manufacturer of "Sapocarbol," who in advertising this article made disparaging statements about a competing product called "Lysoform," was held to be guilty of unfair competition, under sec-

[1] Corte d'appello, Milano, 12 settembre 1906, Ferrario c. Gilardoni; Mon. d. Trib., 1907, p. 32.

[2] Corte di Cassazione, Torino, 12 gennaio 1914, Capelini c. Jensch; Il Filangieri, 1914, p. 419.

[3] Corte d'appello, Milano, 19 novembre 1907, Van Baerle e C. c. Heiman e C.; Mon. d. Trib., 1908, p. 148.

[4] Corte di Cassazione, Torino, 9 settembre 1913, Vassallo c. Pattarino; Il Filangieri, 1914, p. 431.

[5] Corte d'appello, Parma, 21 maggio 1912, Prati c. Garovi; Il Diritto Commerciale, 1913, II, p. 97.

tion 1151 of the Civil Code, for maliciously enticing the customers of a competitor by unlawful and fraudulent means.[1]

A freer range to public-service companies than to ordinary business concerns is suggested by the decision in a case where a cooperative society, in its effort to get a new telephone concession for Milan and vicinity, employed an engineer to appear before a public meeting and discuss the defects and inconveniences of the service furnished by the "Alta Italia," as well as the advantages that would accrue to the public from the proposed enterprise. In denying relief to the "Alta Italia" the court said that since a public franchise was sought vital interests of the public were at issue, and under such circumstances public criticism and censure, such as was complained of, does not constitute unfair competition, but is a legitimate right of the public whenever the conditions depicted actually exist.[2]

Assuming or imitating distinctive designations of another.—Where a manufacturer at Catania who made use of a picture of Ætna and Catania Harbor on the labels for his sauce complained of the use by a competitor in another town of similar labels for a similar sauce, so put up as to clearly resemble the plaintiff's product, the court held that whoever manufactures or sells a product similar to that previously manufactured or sold by another person must abstain from any artifice which is calculated to deceive purchasers regarding the provenance of the goods, especially if the original manufacturer or dealer has in the course of a long period of years established a reputation for his goods and, besides, has made them recognizable to the public by special external distinguishing marks.[3]

A new concern at Milan was obliged to pay damages for getting out a catalogue designed after the catalogue of a company with an established reputation, giving the same descriptions of the goods listed and pricing each article at a lower figure than that named by the old company.[4] Similarly a lye dealer at Milan, after building up a trade as sole agent for Heimann's "Stella-Sole" lye, began to use the name and similar advertising matter in the sale of a lye of his own make and was sued therefor. His plea that the terms "Stella" and "Sole" were in common use in the trade was unavailing and he was obliged to pay damages.[5]

The application of section 1151 of the Civil Code to the misuse of a trade name in order to cause confusion as to the manufacturer of goods is illustrated by the following case:

[1] Corte d'appello, Milano, 1 febbraio 1911, Industria Italiana dei Disinfettanti c. Brioschi; Mon. d. Trib., 1911, p. 169.

[2] Trib. di Milano, 3 luglio 1900; Riv. di Diritto Com., 1904, Pt. II, p. 470.

[3] Corte d'appello, Catania, 29 dicembre, 1911, Narcisi c. Idonia; La Legge, 1912, p. 563.

[4] Corte d'appello, Milano, 7 agosto 1907, Kahn c. Levi; Mon. d. Trib., 1907, p. 849.

[5] Corte d'appello, Milano, 11 ottobre 1907, Barbareschi c. Heimann; Mon. d. Trib., 1908, p. 153.

A company was formed at Maregliano with the name Fratelli Branca fu Carlo & Co., which competed with another concern having the name Fratelli Branca located at Milan. The latter concern brought suit against the former for unfair competition. The court ordered the defendants to discontinue such a use of their own name on their vermouth as was likely to lead the public to believe that it was put up by Branca Bros. of Milan.[1]

Section 6. Spain.

Article 1902 of the Civil Code of Spain contains a general provision of law similar to article 1382 of the Civil Code of France, but it has not been used much until recently against acts of unfair competition.[2]

PENAL CODE.—The Penal Code of Spain contains four articles applicable to certain forms of unfair competition. Articles 291 and 552 prohibit the counterfeiting of the distinctive signs of industrial or commercial establishments and the fraudulent imitation of industrial or literary property. The language of these articles is as follows:

ART. 291. The counterfeiting of seals, marks, notes, or countermarks which industrial or commercial undertakings or establishments use shall be punished with the penalties of correctional punishment by hard labor in its minimum and medium grades.

ART. 552. They shall likewise incur the penalties specified in article 550 who commit any defraudation of literary or industrial property.

Article 550 provides a penalty of major arrest in its minimum and medium grades and a fine equal to treble the damage caused. This penalty is applicable where the imitation is fraudulent and capable of deceiving the ordinary observer.

The substitution of trade-marks or names is prohibited by article 292 as follows:

ART. 292. With the penalty of major arrest and fine of 125 to 1,250 pesetas shall be punished, whoever sells the objects of commerce, substituting on them for the mark or name of the true manufacturer the mark or name of another supposed manufacturer.

Article 514 of the Penal Code prohibits the disclosure of industrial secrets:

ART. 514. The agent, employee, or workman of a factory or other industrial establishment who with injury to his employer discloses the secrets of his industry, shall be punished with the penalties of correctional imprisonment in its minimum and medium grades and fine of 125 to 1,250 pesetas.

LAW CONCERNING INDUSTRIAL PROPERTY.—The law of May 16, 1902, concerning industrial property, under chapter 10, contains

[1] Corte d'appello, Napoli, 27 novembre 1905; Fratelli Branca c. Fratelli Branca fu Carlo e C.; Il Filangieri, 1906, p. 58.

[2] Lobe, Die Bekämpfung des unlauteren Wettbewerbes, Bd. I, S. 91.

several broad provisions for combating unfair competitive practices.[1] Article 131 defines what is meant by unfair or unlawful competition (competencia ilícita), while article 132 specifies seven different classes of acts which constitute unlawful competition. Article 139 provides the penalties for infractions of article 132. The language of these three articles is as follows:

ART. 131. By unfair competition is understood every attempt to profit unlawfully from the advantages of an industrial or commercial reputation acquired by the efforts of another, and which is his property by virtue of the present law.

ART. 132. As constituting acts of unfair competition are considered:

(*a*) The imitation of the designs or inscriptions of store windows, store fronts, decorations, or anything else susceptible of causing confusion with another establishment of the same kind adjoining or very near.

(*b*) The imitation of the wrappers used by a competing house in a manner to lead to confusion.

(*c*) Choosing as the name of an industrial or commercial organization a designation in which is included the name of a locality known as the seat of a well-known establishment with the object of profiting unlawfully from its reputation.

(*d*) Wilfully circulating false assertions against a rival with the object of taking away his customers.

(*e*) Publishing announcements, advertisements, or newspaper articles tending to depreciate the quality of the products of a competitor.

(*f*) Announcing oneself in a general manner and contrary to the actual facts as a depositary of a product national or foreign.

(*g*) The use without proper authorization of designations or expressions such as "prepared according to the formula of—" or "in accordance with the process of manufacture of —," unless the formula or the process belongs in the public domain.

ART. 139. In all the cases which constitute unfair competition, according to article 132, as well as in those of falsehood in the designations of provenance, the authors shall be punished with fines of from 100 to 500 pesetas; the accomplices with fines of from 50 to 250 pesetas; and the concealers with fines of from 25 to 175 pesetas, all these at the instance of the interested party.

According to one authority, the definition of unfair competition in articles 131 and 132 of the above law is incomplete and defective so that its scope is greatly restricted. In the first place only acts involving forms of industrial property protected by the law are prohibited, and in the second place the acts that can be prosecuted as unfair competition are specified in article 132, leaving all other acts beyond the reach of the law.[2]

The following are examples of cases brought under the above provisions of law.

A company opened two coffee stores under the commercial name Tupinamba, having obtained the exclusive use of this name from the proper authorities. A competing concern opened stores directly op-

[1] Ley de 16 mayo de 1902 sobre la propriedad industrial; Boletin de la Revista General de Legislación y Jurisprudencia, Tomo, 116, pp. 117, 120.

[2] Enciclopedia Jurídica Española (1910), Tomo VII, p. 634.

posite the two Tupinamba stores, imitating in their exterior decoration the style and color of the latter and also the color, style, and form of the containers of the latter. The signs over the new stores contained besides the name, the words "branch of Tupinamba," the words "branch of" being written in small letters and the word "Tupinamba" in letters as large as those used to designate the bona fide stores. Action was brought under articles 131, 132 (a) and (b), and 139 of the Law of Industrial Property of May 16, 1902, on the ground that these acts resulted in confusing the majority of the public and judgment was obtained. Upon appeal the supreme tribunal affirmed the decision.[1]

Defendant registered a trade-mark for a pharmaceutical product consisting of a rectangular label bearing in large letters the word "Histógeno" in imitation of the registered trade-mark "Histogenol," with which plaintiff designated a similar and competing product. Defendant also inserted statements in the medical journals to the effect that the product of his competitor had been shown by tests to be liable to decompose and become poisonous while his preparation was unchangeable and preferred by all the principal hospitals. Action was brought for violation of paragraph (*e*) of article 132 of the law of industrial property and the penalties prescribed by article 139 were demanded. The court held that, although article 132 (*e*) designated as one form of unfair competition the publication of announcements, advertisements, or articles in periodicals, which tended to depreciate the quality of the products of a competitor, this provision taken in connection with section 131 related only to products, in respect to which there existed a property right known and registered, and, as such right was expressly prohibited for pharmaceutical products by article 19 (*d*) of this law, no protection against criticism was afforded by article 132 (*e*). The court held, however, that the trade-mark of the defendant being duly registered was protected against imitation, counterfeiting, etc., by the provisions of this law.[2]

Articles 124 to 130, inclusive, of the law of industrial property deal with the use of designations of provenance. According to article 125 no one has the right to make use of the name of a place of manufacture to designate a natural or manufactured product coming from another place. Geographical designations which have become generic are excepted. This exception, however, is not applicable to vinous products. The penalty for the infraction of this law is provided in article 139 above.

The counterfeiting and usurpation of patents of invention, trademarks, designs, and models of manufacture are dealt with in articles

[1] Madrid, sentencia de 30 de diciembre de 1907; Gaceta de Madrid, 28 enero, 1909, anexo núm. 3, núm. 28, p. 171.

[2] Tribunal Supremo, 8 de julio de 1911; Jurisprudencia Criminal, Tomo. 87 (1911), p. 48.

133 to 137, inclusive. Article 133 provides that the counterfeiting of these forms of industrial property shall be punished in accordance with article 291 of the Penal Code. Article 135 provides that the usurpation of patents is punished with a fine of from 200 to 2,000 pesetas. Accomplices and concealers receive less severe penalties. Article 136 prescribes a fine of from 25 to 125 pesetas for:

1. Those who use a trade-mark, design, or industrial model without having the corresponding certificate of property, and who convey the impression by using the term "registered" or other analogous expressions that they have such certificate.

2. Those who being legitimate proprietors of a trade-mark affix it to products distinct from those for which it was granted.

3. Those who having altered the total or partial configuration of the distinctive mark, design, or model use it with the expression "registered" or other analogous expressions without actually having registered this variation.

4. Those who remove from goods in order to sell them the trade-marks of the producer without his express consent, although they do not affix said trade-marks to other products.

Article 138 provides that those who use a trade-mark, design, or model in a manner which can mislead the consumer, by causing him to confuse them with the true and lawful signs, shall be punished in accordance with article 552 of the Penal Code, which provides a penalty of imprisonment from one month and one day to three months, together with triple damages. The following are cases based on this article:

A French liquor distilling concern registered a trade-mark in Spain together with special containers and labels to distinguish its product. The trade-mark was a design with the word "Benedictine." Another liquor manufacturer used the name "Bernardine" and also imitated the form and color of the containers of the plaintiff in order to create a confusion between the two products. The lower court condemned him to imprisonment for two months and one day together with fines, indemnities, and costs. Upon appeal the Court of Cassation affirmed the decision, holding that the defendant had used casks or demijohns with designs and inscriptions similar to and so closely resembling those of the plaintiff that the consumer could easily be led into error, confusing it with the original brand known and sold with the name Benedictine. Hence it declared these acts to be unfair competition and a violation of article 138 of the law of industrial property.[1]

In a recent decision in which a patented model of containers was used in such a way that it was confused with the legitimate one, the court held that the act constituted unfair competition as defined and punished in article 138 of the law of May 16, 1902.[2]

[1] Tribunal Supremo, 24 de abril de 1909; Jurisprudencia Criminal, Tomo, 82 (1909), p. 426.

[2] Enciclopedia Jurídica Española, Apéndice de 1913, p. 223.

The usurpation of commercial names and industrial awards is dealt with in articles 140 to 145, inclusive. The language of the first four of these articles is as follows:

ART. 140. As a usurpation of a commercial name shall be punished with a fine of from 25 to 125 pesetas:

1. The use of a commercial name as registered, when it is not legally registered.

2. The designation of an establishment by means of a denomination which belongs to another and older house, whose name has been registered.

3. The false designation of an establishment as a branch of another, national or foreign, whose name is in the register.

ART. 141. Those who employ with bad faith the commercial name which has been registered as the exclusive property of another, living in the same locality, shall be punished with a fine of from 50 to 250 pesetas.

ART. 142. Those shall be punished with a fine of from 25 to 125 pesetas who affix the industrial awards which they have obtained to products distinct from those for which they were granted. With a fine of from 125 to 250 pesetas shall be punished those who use on the designs or inscriptions of their establishments, announcements, invoices, labels, etc., reproductions of medals and industrial awards to which they have no right.

ART. 143. A fine of from 250 to 500 pesetas shall be imposed upon those who use reproductions of medals and industrial awards making allusion to expositions or fairs which have not taken place.

According to article 144 compensation for damages and injuries are additional to the above penalties.

Section 7. Portugal.

The laws relating to unfair competition in Portugal are similar to those in Spain. Article 2361 of the Civil Code, which, like article 1382 of the French code, is applicable to unfair competition, provides that whoever violates or offends the rights of another incurs the obligation to indemnify the injured party for all the damages which he has caused.[1] The law of May 21, 1896,[2] concerning industrial and commercial property contains, especially in articles 198 to 209, inclusive, numerous provisions against unfair competition, with penalties of fine and the payment of damages to persons injured. The language of the most important articles is as follows:

ART. 198. The use of a geographical name in the sense of an indication of provenance is not allowed, except when the article to which it is applied was really there produced, worked, or modified.

Exception is made in the case in which the geographical name loses the restrictive character to designate a class of products known in commerce by that name. This exception does not apply to vinous products.

ART. 199. The indication of provenance consists of the designation of a locality or region which has become known for its products.

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[1] Código Civil, art. 2361.

[2] Lei, 21 maio 1896, Providencias para garantia da propriedade industrial e commercial. Collecção da Legislação Portugueza, 1896, p. 337.

ART. 200. Goods manufactured abroad or in Portugal may bear, respectively, the name or the mark of a merchant of Portugal or of a foreign country, provided that the indication of the country in which they were manufactured is clearly visible, and that it be proved by an authentic document that the said name or mark was affixed with the consent of the merchant in question.

ART. 201.—Considered to be cases of unfair competition, and as such punishable, are:

(1) Those in which indications of false provenance are made.

(2) Those in which the manufacturer or merchant employs signs, paints the façade of his shop, and arranges or furnishes it, in a manner to cause confusion with some other adjoining or nearby establishment of a like nature.

(3) Those in which the manufacturer or merchant attributes his goods to a manufacturer other than the true one without due authorization.

(4) Those in which the tradesman or merchant pretends to have deposited or registered his goods abroad without having done so.

(5) That in which the manufacturer declares: "Manufactured according to the formula or process of the factory of * * *," or the equivalent thereof, when he can not produce a document proving an authorization granted for that purpose, or when the formula or processes are not in the public domain.

(6) Those in which the manufacturer or merchant, for the purpose of giving a reputation to his goods, appropriates, without authorization, in any form or manner, the name, the mark, or the establishment of another manufacturer or merchant who manufactures or deals in similar goods.

(7) Those in which the Portuguese manufacturer puts upon his goods foreign names, marks, or labels, genuine or fictitious, in such a way as to induce the belief that they are foreign products.

(8) Those in which the manufacturer by bribery, espionage, or buying employees or laborers, or, in any other criminal manner, procures and makes use of the disclosure of a factory secret.

(9) Those in which the unregistered mark of a certain article is eliminated, and another mark is put in the place of it.

In addition to these provisions relating specifically to unfair competition the law contains various provisions for the protection of trade-marks, industrial or commercial names, industrial models, designs, awards, etc.

Section 8. The Netherlands.

PENAL CODE.—Certain unfair competitive practices in the Netherlands are prosecuted under the various provisions of the Penal Code or of special laws, while other practices afford ground for civil actions under the general provisions of sections 1401 and 1402 of the Civil Code. The circulation of slanderous statements is prohibited by article 261 of the Penal Code. Civil actions to recover damages for injury to honor or good name sustained as a result of slander are provided by article 1408 of the Civil Code.

The unauthorized disclosure of trade secrets is prohibited by article 273 of the Penal Code, which is as follows:

ART. 273. Whoever intentionally makes known any facts relating to an undertaking in trade or industry in which he has been or is interested, and concerning which facts secrecy has been imposed upon him, will be punished with im-

prisonment of not more than six months or with a fine of not more than 600 guilders. Prosecution does not take place except upon complaint by the management of the undertaking.

Furthermore, the misappropriation or misuse of a competitor's business designations is prohibited by article 337, the first paragraph of which is as follows:

ART. 337. Whoever intentionally imports within the Kingdom in Europe without a clear stipulation that such goods will be exported, or whoever sells, offers for sale, furnishes, distributes, or has in stock for sale or distribution any goods which or the wrappers of which have been falsely provided with the name, firm name, or trade-mark, to which some other person is entitled, or with the name of a definite place as an indication of provenance, but with the addition of a fictitious name or firm name, or upon which goods or upon the wrappers of which said name, firm name, or trade-mark, even if slightly altered, have been imitated, will be punished with imprisonment of not more than three months or with a fine of not more than 600 guilders. * * *

There have been frequent complaints as to the effect of the foregoing provision,[1] and the draft of a proposed penal code[2] by the Minister of Justice, Cort van der Linden, contains the following substitute:

ART. 326. Whoever, in order to establish, maintain, or extend his business sales, intentionally commits fraudulent acts for the purpose of deceiving the public or his customers is punished as guilty of unfair competition with imprisonment of not more than one year or with a fine of not more than 900 florins.

CIVIL CODE.—Articles 1401 and 1402 of the Dutch Civil Code contain broad general principles of law similar to articles 1382 and 1383 of the French Civil Code, which have been successfully applied by the courts to cases of unfair competition. The language of these articles is as follows:

ART. 1401. Every unlawful act by which another person sustains injury obliges him by whose fault the injury has been caused to compensate for the same.

ART. 1402. Every person is responsible for the injury he has caused not only by his act but also by his negligence or imprudence.

Dutch jurists are not in agreement as to the scope of the term "unlawful act" (onrechtmatige daad), and as a result there has been no uniformity in the decisions of the Dutch courts regarding the applicability of section 1401 of the Civil Code to unfair competitive practices.

Two different views obtain: The first or restrictive interpretation is based chiefly on two decisions of the Supreme Court (Hooge Raad) of April 6, and June 29, 1883,[3] where "unlawful act" (onrechtmatige daad) was defined as "solely such an act of commission or omission as prejudices a legal right or violates the rights of another."

[1] Praeadvies van Josephus Jitta in Handelingen der Nederlandsche Juristen-Vereeniging, 1903, p. 42 fol.

[2] Herziening van het Wetboek van Strafrecht, Deel I, Wetsontwerpen en Toelichting. 's Gravenhage, 1900.

[3] Weekblad van het Recht, Nos. 4901, 4927, and 8168.

The second or broader view maintains the applicability of section 1401 of the Civil Code to unfair practices of competition as set forth in Molengraaff's fundamental discussion of the whole subject in his paper entitled "De oneerlijke concurrentie voor het forum van den Nederlandschen rechter."[1]

Molengraaff formulated his view thus:

> Whoever in commercial intercourse acts otherwise than is proper for one man toward another, or otherwise than is proper to act with respect to one's fellow citizens, is obliged to render compensation for the damages thus caused to others.

This more liberal interpretation of the term "unlawful act" has since then been frequently adopted by the Dutch courts and has made it possible to recover in an action for damages on account of practices which are considered unfair and unlawful by every fair and reasonable man.

The court at Zwolle held that the words "unlawful act" in section 1401 of the Civil Code must not be interpreted in the restricted sense, as if they signified only such acts as are prohibited by the law or by ordinances issued by an authorized power; that all those acts are to be understood, attributable to the perpetrator, which cause injury to another, and which in organized society are to be considered as entirely out of harmony with the current conceptions of morality and propriety and that for that reason also they come under unfair competition.[2]

The same court[3] held that the word "unlawful" comprises everything that is contrary to justice, fairness, and good faith. The court at Amsterdam held that "not only every act that does not conform to the written law of the statutes and decrees is 'unlawful,' but also every act which is not permitted according to justice, fairness, and good faith."[4]

A decision of the court of Gröningen, which was affirmed by the court at Leeuwarden, states that "in order to determine certain acts as being 'unlawful' and as constituting unfair competition it is necessary that said acts must be contrary, if not to the law or to general legal principles, at any rate to the generally prevailing conceptions of morality and good faith."[5]

The restrictive interpretation of section 1401 of the Civil Code was again upheld by the Supreme Court in its decision of January 6, 1905,[6] where it held that sections 1401 and 1402 apply only to those acts of

[1] Rechtsgeleerd Mag., 1887, p. 373, 386. Cf. Nederlandsche Handelsrecht, 1912, p. 76.
[2] Gericht zu Zwolle, Urt. v. 14. März, 1894; Öster. Patentblatt, 1903, p. 185.
[3] 29 Apr. 1903, Weekblad van het Recht, No. 7971.
[4] Gericht zu Amsterdam, Urt. v. 13. Juni, 1899; Öster. Patentblatt, 1903, p. 184.
[5] Gericht zu Gröningen, Urt. v. 3. März, 1899; Gericht zu Leeuwarden, Urt. v. 23. Mai, 1900; Öster. Patentblatt, 1903, p. 185.
[6] Weekblad van het Recht, No. 8163.

omission or commission whereby a legal right is prejudiced or where the rights of another are violated. It may be granted, the court says, that the act on account of which suit is brought may conflict with what is proper in commercial intercourse, but this does not permit us to conclude therefrom that these acts are unlawful in the sense of sections 1401 and 1402.[1]

The effect of this decision of the Supreme Court, apparently would be to make section 1401 of the Civil Code inapplicable to many cases of unfair competition.[2]

On March 9, 1914, the Queen of the Netherlands, "in view of the need for a special provision for the suppression of unfair competition," submitted to the second chamber of the Dutch Parliament, to be incorporated into the Penal Code the following provision drafted by Mr. Aalberse,[3] which is similar to the proposed substitute for article 326 referred to above. (See p. 607.)

ART. 326bis. Whoever, in order to establish, preserve, or extend his business sales, commits an act to deceive the public or a particular person, providing any injury can arise therefrom to his competitors, is punished as guilty of unfair competition by imprisonment not to exceed one year or by a fine not to exceed nine hundred guilders.

The following cases illustrate some of the forms of unfair competition which have been prosecuted under the general provisions of the Civil Code:

The court at Zwolle assessed damages against a merchant, who in a newspaper advertisement stated that his competitor had mixed Russian oil with his so-called American oil, thereby injuring the plaintiff by leading the public to suspect said oil to be of an inferior quality. The decision was affirmed by the court at Arnhem, which held that although no distinct act was mentioned to which the injury might be traced, nevertheless a statement like this in its very nature caused an injury, since it was not likely that customers who have once become prejudiced would henceforth trust the seller of these goods.[4]

The publication of a notice that the goods furnished by a certain manufacturer are useless was held not to be an insult, but to constitute an unlawful act.[5]

The court at Breda held that if goods (stoves) are sold as coming from a well-known factory, but in reality have not been manufactured there, the factory thus defrauded will sell a smaller number of

[1] Weekblad van het Recht, 8 Feb. 1905, No. 8168.
[2] R. W. J. C. De Menthon Bake; Rechtsgeleerd Magazijn, 1907, p. 454.
[3] Weekblad van het Recht, No. 9599, Apr. 1, 1914.
[4] Gericht zu Zwolle, Urt. v. 14. März, 1894; Gericht zu Arnhem, Urt. v. 16. Jan. 1895; Öster. Patentblatt, 1903, p. 184.
[5] Gericht zu Hertogenbusch, Urt. v. 5. Mai 1900; Öster. Patentblatt, 1903, p. 185.

stoves than it would have sold otherwise, and therefore will sustain an injury.[1]

The court at Rotterdam held that the manufacturer who imitated, even with some slight deviation, the wrappers which a competitor had devised and introduced into business and thereby caused confusion in the public mind concerning the two manufacturers had committed an unlawful act.[2]

In a case where a former saleswoman of a certain La Fontijn opened a similar shop in the same street and announced on the door of her shop, in small letters, "M———, formerly saleswoman of," and then in much larger letters "La Fontijn," the court at Breda held the defendant for damages under article 1401 of the Civil Code because the said act constituted unfair competition.[3]

The court at Rotterdam in a decision March 21, 1898, confirmed by the court at 's-Gravenhage, stated:

> Someone invents a disinfectant and calls it "Lysol," a name that comes into general use. Now, it does not constitute unfair competition if another person sells a disinfectant of the same composition; only it must be clear that the new product does not come from the original manufacturer of "Lysol."[4]

Section 9. Switzerland.

INTRODUCTORY.—There is as yet no Federal law in Switzerland dealing specifically with unfair competition, although in November, 1908, the Swiss Federal department of industries called a conference of representatives of the business associations of Switzerland, at which preliminary steps were taken looking toward a future enactment of such a special Federal law.[5] Several of the cantons, however, have adopted laws against unfair competition which resemble the German law of 1909.

Section 96 of the draft of the proposed Federal penal code,[6] contains the following provision regarding the practice of enticing a competitor's customers:

> Whoever entices the clientele of another by unfair methods, especially by crafty devices, fraudulent statements, or malicious insinuations, is punished upon complaint, with imprisonment or with a fine not to exceed 20,000 francs. Both penalties may be combined.

Section 96 is supplemented by section 97, which provides the same punishment for the betrayal or spying out of factory and trade secrets, as well as for the unfair use of such secrets.

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[1] Gericht zu Breda, Urt. v. 24. März 1896; Öster. Patentblatt, 1903, p. 184.
[2] Gericht zu Rotterdam, Urt. v. 6. Nov., 1901; Öster. Patentblatt, 1903, p. 185.
[3] 30 Juni 1896, Weekblad van het Recht, 1896, No. 6855.
[4] Gericht zu Rotterdam, Urt. v. 21. März 1898; Öster. Patentblatt, 1903, p. 185.
[5] Conrad, Handwörterbuch d. Staatswissenschaften, vol. 8, 1911, p. 797 fol.
[6] Vorentwurf zu einem Schweizerischen Strafgesetzbuch, April, 1908.

LAW OF OBLIGATIONS.—The new Swiss Federal Law of Obligations of 1911[1] contains in articles 41 and 48 broad civil-law provisions against unfair practices. The first paragraph of article 41 is the same as article 50 of the old Law of Obligations.

ART. 41. Whoever unlawfully causes injury to another, either intentionally or through negligence, is bound to compensate him.

In like manner, whoever intentionally causes injury to another in a manner repugnant to good morals is bound to make compensation.

ART. 48. Whoever as a result of false publications or of other practices contrary to good faith is disturbed in his business clientele or threatened in the possession thereof can demand cessation of these business practices and in case of fault compensation of the injury.

These provisions apparently are broad enough to cover a variety of unfair practices, as the following cases will illustrate:

A manufacturer of a liqueur advertised it as "Hors concours 1889," thus leading the public to believe that his product was not entered at the Paris Exposition in 1889 because it had already obtained the highest awards, whereas in fact it was there awarded only a silver medal and honorable mention. In an action for damages brought by a competitor the court held that the circulation of this misleading announcement was an act of unfair competition and afforded ground for a civil action for damages under article 50 of the Law of Obligations[2] (article 41 of the present law).

A cooperative society of a certain Swiss city published two articles charging that an association of fuel dealers, which had a contract with the city to purchase all its coke from the city gas plant, had taken steps before the city authorities to hinder or wholly prevent the delivery of coke to the society. The association of fuel dealers brought suit for damages under article 48 of the Law of Obligations on the ground that the circulation of this statement was unfair competition. It was shown that the charge was not justified by the facts and that the defendant had been negligent in not ascertaining the truth before circulating the statement, but it was not shown that defendant had wilfully distorted the facts. The court denied recovery on the ground that there was nothing in the declaration or the findings to show that any damage had been done, or was likely to be done, to the plaintiff.

In rendering its opinion the court stated that article 48 offered two means of protection to persons injured by acts of competition, to wit: (*a*) An action to enjoin practices susceptible of causing a diminution or loss of clientele, for which action the commission of a legal wrong (faute) is not necessary; and (*b*) an action for damages, which requires proof of a legal wrong and the existence of injury. Plaintiff

[1] Schweizerisches Obligationenrecht vom 30. März 1911.

[2] Ricqlès & Co. c. Bonnet & Co., Tribunal Fédéral Suisse, 20 mai 1893; Entscheidungen des Schweizerischen Bundesgerichtes Bd. XIX, p. 248.

had argued that malicious intent was not necessary for the applicability of section 48, and that the probability of future damage was sufficient to establish the liability of the defendant. The court, however, did not rule on the point of what constituted a legal wrong in the sense of article 48, but dismissed the case on the second ground, viz, absence of injury.[1]

A Swiss manufacturer of hairsprings for watches, who had his registered trade-mark on a green wrapper, attempted to enforce his claim to the exclusive right to use green wrappers by securing an order for seizure of similarly wrapped springs made by a competitor, which were sold by a jeweler in La Chaux-de-Fonds, who advertised his shop as the "dépôt exclusif" for springs in green wrappers. He also brought suit against the maker of the competing springs, charging him with fraudulent imitation under the trade-mark law of December 19, 1879, and unfair competition under article 50 (article 41 of the present law) of the Law of Obligations. Besides he inserted advertisements in two newspapers, stating that all springs in green folders sold by persons other than his exclusive selling agent, S., were only a poor imitation of his genuine green-wrapped springs. The court held that the right to use green folders for wrapping hairsprings was common property, and, as no infringement of plaintiff's registered mark was alleged, he had no ground of action against the competing manufacturers for either infringement or unfair competition. On the other hand, the court compelled the plaintiff to make reparation to the defendant for the damage caused to his trade by the seizure and the untruthful advertisement that his goods were a poor imitation. The court took occasion, however, to characterize the jeweler's course in advertising his shop as the exclusive depot for springs in green wrappers as unfair competition, since it was a false statement calculated to injure another's business.[2]

In a frequently cited case involving the imitation of the title of a newspaper by a competitor the Federal Supreme Court held that such imitation was not a violation of the copyright law but an act of unfair competition, because it was intended to deceive the public by introducing a new article under the designation of an old one.[3]

The superior court of the Canton Zürich held that "although a copyright can not attach to a time table or to a railway guide, yet because it has been published in the same form for many years a right to it has been established, so that a third party may not publish

[1] Société des Marchands de Combustibles de La Chaux-de-Fonds et consorts c. Coopérative des Syndicats de La Chaux-de-Fonds, Trib. Fédéral Suisse, 26 avril 1913; Entscheidungen des Schweizerischen Bundesgerichtes, Bd. 39, II, S. 227.

[2] Baehni et Cie. contre Huguenin, Trib. Fédéral Suisse, 18 juillet, 1891; Entscheidungen des Schweizerischen Bundesgerichtes, Bd. XVII, p. 462.

[3] Orell Füssli c. Schweizerisches Vereinssortiment; Schweiz. Bundesgericht., 18. Dez. 1891. Entscheidungen des Schweizerischen Bundesgerichtes, 1891, Bd. XVII, p. 753.

said time table in a form which might lead the public to believe that the new publication was the same as the old one."[1]

In a recent case brought before the commerce court of Bern the question was raised whether false advertising (or misrepresenting one's own goods) was unfair competition in violation of article 48 of the Law of Obligations. The court stated that hitherto, under unfair competition, the Swiss civil courts had dealt only with cases involving the diverting of a competitor's clientele by usurping his distinctive marks, disparaging his goods, or circulating false statements about him, but that the false advertising of one's own goods should also be considered as unfair competition in the sense of article 48, since, even though the legal rights of competitors are not directly prejudiced thereby, their relations with their customers are nevertheless injured.[2]

TRADE-MARK LAW OF SEPTEMBER 26, 1890.—The Federal law of September 26, 1890[3] (which abrogates the law of 1879), concerning the protection of trade-marks, the indication of provenance, and industrial awards, prohibits (1) imitations of a registered trade-mark that deceive the public; (2) unlawful use of another person's trade-mark; (3) dealing in goods to which trade-marks have been unlawfully attached.

Several articles of this act relate to indications of provenance. According to article 18 a manufacturer or producer may use the name of a city, locality, or country as an indication of provenance of his products, but it is forbidden to affix a false indication of provenance to goods. Names of localities or countries which have assumed such a general character that in commercial usage they designate the nature and not the provenance of goods are excepted by article 20 from the above prohibition. According to this article (20) it is allowable for a manufacturer to use the name of the locality of his main establishment as a designation of provenance for goods produced elsewhere, provided his firm name or registered trade-mark is added to the designation of provenance.

Article 24, relating to the usurpation of trade-marks, is as follows:

ART. 24. According to the provisions mentioned below, civil or criminal action may be taken against—

(*a*) Whoever counterfeits the trade-mark of another or so imitates it that the public is deceived.

(*b*) Whoever uses the trade-mark of another for his own products or goods.

(*c*) Whoever sells, offers for sale, or puts into circulation products or goods

[1] Obergericht des Kantons Zürich, Entscheid vom 12. Mai 1894, cited by Alfred Simon "Der gewerbliche Rechtsschutz in der Schweiz," 1897, p. 174.

[2] Handelsgericht des Kantons Bern, 15. Dez. 1913, Jordi-Kocher und Kons. c. Moses Bernheim; Zeitschrift d. Bernischen Juristenvereins, 1914, p. 276.

[3] Bundesgesetz betreffend den Schutz der Fabrik-und Handelsmarken, der Herkunftsbezeichnungen von Waaren und der gewerblichen Auszeichnungen vom 26. September, 1890.

which he knows are provided with a trade-mark which is counterfeited, imitated, or unlawfully affixed.

(*d*) Whoever knowingly takes part in the above-named offenses or knowingly aids or facilitates their commission.

(*e*) Whoever refuses to indicate the provenance of products or goods in his possession which bear counterfeited, imitated, or unlawfully affixed trade-marks.

(f) Whoever violates the provisions of articles 18, third paragraph, 19, 20 (sec. 1), 21, and 23 of this law.

Article 26 supplements the preceding provisions, as follows:

ART. 26. Whoever to his trade-marks or business papers falsely adds a statement which is intended to create the impression that a trade-mark has really been registered;

Whoever, on his business signs, advertisements, prospectuses, invoices, letters, or papers, improperly makes use of indications of provenance or mention of trade distinctions, or omits the indications prescribed by article 22, is punished ex officio[1] or upon private complaint with a fine of from 30 to 500 francs or with imprisonment of from three days to three months. Against former offenders these punishments may be doubled.

FEDERAL DECREE OF MAY 8, 1914, RELATING TO FOODSTUFFS.—Article 3 of the decree of May 8, 1914, of the Federal Council relating to the commerce in foodstuffs[2] provides against the use of deceptive labels.

ART. 3. Foodstuffs shall not be brought into commerce under a designation calculated to deceive.

The employment of marks and imaginary names which might give rise to deception is prohibited whether they are registered as trade-marks or not.

If it is required to affix a descriptive designation upon the goods themselves or upon their wrappers (containers, covers, etc.), striking imaginary names, in so far as their use is at all permitted, shall not be affixed in letters larger than the descriptive designation. The superscriptions must be so made that the descriptive designation is visible together with the imaginary name.

CANTONAL LAWS.—In the absence of a special Swiss Federal law against unfair competition, several Cantons have enacted such laws, viz, Zürich, 1911; City of Basel, 1900; Luzern, 1900 (revised in 1912); Freiburg, 1900; Neuchâtel, 1904; Aargau, 1911.

These cantonal laws are similar to the German law against unfair competition, and prohibit fraudulent advertising, refusal to sell goods at the price advertised, disparagement of competitors, and betrayal of business and trade secrets.

Basel and Luzern require permission by the police for conducting closing-out sales that have not been authorized by a court, and the permission is made dependent upon such business having been established in a community of the Canton for at least two years. In Freiburg it is an offense to advertise for sale below cost a large stock of goods for the purpose of ruining the business of a competitor. The law of Neuchâtel requires that when rebates are given the rate must be

[1] That is, upon initiative of the Government.

[2] Verordnung d. schweizerischen Bundesrats betreffend d. Verkehr mit Lebensmitteln u. Gebrauchsgegenständen vom 8. Mai 1914; cf. Eidgen. Gesetzsammlg. No. 14, 20. Mai 1914, p. 180 fol.

indicated. Selling goods according to the "coupon," "Hydra," "Gella," or "snowball" system[1] is prohibited by police ordinances in Luzern, Schwyz, Waadtland, and Zürich.

Unfair competition law of Zürich.—On January 29, 1911, the Canton of Zürich adopted by popular vote a law against unfair competition.[2] This law resembles somewhat the German law of 1909, although it is not so comprehensive.

Sections 1, 2, and 5 of this law relate to deceptive advertising:

SEC. 1. In public business advertisements (by means of newspaper advertising, circulars, posters, etc.) no untruthful statements must be knowingly made whereby honest business activity, based on good faith, is injured or endangered.

SEC. 2. It is prohibited in particular to knowingly make incorrect or otherwise misleading statements in public offers of goods or of industrial services concerning business relations, as, for instance, concerning quality and price of goods, size of stocks, source or method of supply, which awaken the impression of an unusually favorable offer.

SEC. 5. No owner of a business shall advertise goods for sale at a lower price than that at which he is actually willing to sell them.

Sections 3 and 4 relate to methods of advertising closing-out sales and sales of goods from a bankrupt stock.

SEC. 3. The announcement of closing-out sales (liquidations) is permissible only with the consent of the proper authorities of the Government Council.

Permission is to be refused if the announcement gives evidence of a purpose of unfair business practices. Permission already granted is to be revoked if such a practice becomes evident; in case of disobedience the closing of the business is to be ordered, if necessary, by the cantonal authorities.

The Government Council will, by a decree subject to approval by the Cantonal Council, establish the special regulations concerning permits for closing-out sales and the fees payable therefor.

SEC. 4. Announcements of the sale of goods coming from a bankrupt or attached stock, but which no longer belong to the said stock, must not be so worded as to create the impression that the sale takes place on the order or for the account of the bankruptcy or prosecuting office.

Section 6 relates to disparaging another's goods or services:

SEC. 6. It is prohibited, for purposes of competition, knowingly and publicly to designate the goods or services of another as being inferior.

Section 7 relates to corrupting a competitor's employees to obtain trade secrets:

SEC. 7. It is prohibited (*a*) to attempt to learn factory secrets by means of gifts, promises, or in other unfair ways, from employees or workmen of a competing business, and to attempt to procure models or specifications of a technical nature, as well as to make unauthorized use of secrets thus learned for purposes of competition; (*b*) to make or to promise gifts to employees or workmen of a business concern in order to procure orders for supplies or for work from said concern.

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[1] Similar to "block" system, see p. 666.

[2] Gesetz gegen den unlauteren Wettbewerb im Handels- und Gewerbebetrieb, vom 29. Jan. 1911.

According to section 8, violations of the provisions of this law will be punished by the cantonal authorities with fines of from 20 to 1,000 francs. In cases of a second offense, larger fines are authorized and the offender may be bound over to the circuit court, which may also inflict imprisonment of not more than one month. The right to apply the provisions of the Penal Code is not impaired, as well as the right to civil prosecution of a claim for damages. The department of justice and the police authorities are charged with the enforcement of this law.

Unfair competition law of Neuchâtel.—The law relating to unfair competition and closing-out sales of April 27, 1904, of the Canton Neuchâtel[1] provides against a greater number of specific unfair practices of competition than those prohibited in the similar law of Zürich. Chapter I (arts. 1 to 8) contains provisions for the suppression of inexact, deceptive, or disparaging statements, as well as the divulgence of trade secrets. Chapter II (arts. 9 to 22) relates to closing-out sales. Chapter III (arts. 23 to 26) relates to penalties for violations of this law.

Articles 1 and 2 of this law prohibit false advertising of goods:

ART. 1. It is forbidden, especially in offering merchandise, to make, in publications concerning the nature, quality, quantity, price, process of manufacture of merchandise, as well as the reasons for the sale, false statements with a view to creating the impression of an extraordinarily advantageous offer.

The term "publication" includes announcements, circulars, prospectuses, advertisements, posters, pictures, business papers, containing any of the indications above mentioned.

ART. 2. The prefect of police, ex officio or on complaint, has the right at all times to demand proof of the statements published on the subject of the existence and the importance of the stock or of the reasons for the sale of the merchandise offered.

He brings the case before the examining magistrate if this evidence is not forthcoming.

Articles 3, 4, and 5 forbid deceptions as to price and quantity of goods:

ART. 3. All merchandise exposed for sale with a price mark must be delivered immediately at the price indicated to anyone who declares himself a cash buyer thereof.

ART. 4. The prices fixed for sale at retail must be expressed in legal-tender money and correspond exactly to the units or whole multiples of officially recognized weights and measures.

When a price is indicated in regard to a certain quantity of merchandise, it is assumed to apply to the whole of that quantity.

ART. 5. The announcement of a discount must always indicate the rate.

Article 6 prohibits the promise of aleatory or speculative consideration in connection with the sale of goods:

ART. 6. It is forbidden to attract buyers by the promise of aleatory advantages under any form whatever.

[1] Loi du 27 avril 1904, sur la concurrence déloyale et les liquidations.

Article 7 relates to disparaging a competitor's business:

ART. 7. It is forbidden to relate or to affirm acts that are known to be inexact and of a nature to injure a competitor in the exercise of his trade or industry.

Article 8 relates to the divulgence of trade secrets:

ART. 8. It is forbidden to employees, workmen, or apprentices of a commercial house or an industrial establishment to divulge the commercial or industrial secrets of which they have acquired knowledge by reason of their situation unless authorized to do so by the proper authority.

It is equally forbidden to incite employees, workmen, or apprentices to divulge secrets of this kind.

Articles 9 and 10 relate to the definition of closing-out sales:

ART. 9. A closing-out sale means every operation by which, under any name whatever, a merchant seeks to accelerate the normal turnover of all or part of his goods, having recourse for this purpose either to a reduction of the ordinary price of these goods or to notices (closing-out sale, cut-price sale, sale at any price, etc.) tending to create the impression of a particularly advantageous sale.

ART. 10. Excluded from the regulations of the present law are (*a*) sales conducted in execution of Federal laws; (*b*) sales made at public auction in conformity with the provisions of the Code of Civil Procedure.

Articles 11, 12, and 13 state the conditions under which a closing-out sale may be authorized:

ART. 11. No general or partial liquidation shall be announced or opened without a written authorization, granted by the prefecture, which informs the local authority of it.

The request for authorization must give the reason in writing and be signed by the proprietor of the goods or his authorized representative.

ART. 12. To conduct a closing-out sale, only that merchant can be authorized who, in the locality where it is to take place, has been making a profession of buying and selling merchandise of the same kind as that to be closed out, for two years at least, if it is a question of a partial closing-out sale.

ART. 13. The preceding article may be deviated from by decision of the police department under exceptional circumstances (departure, decease, prolonged sickness of the head of the house, etc.).

Article 14 regulates announcements or advertisements of closing-out sales:

ART. 14. Every published announcement relative to a closing-out sale must indicate the name of the proprietor of the merchandise and his firm name.

Besides, it must expressly state the true character of the closing-out sale (general or partial).

Article 15 relates to the locality where the closing-out sale is to be conducted:

ART. 15. The closing-out sale must be held in the localities where the merchant plies his trade. This rule may be deviated from under exceptional circumstances with the authorization of the police department.

Article 16 requires an inventory of stock before authorization of a general closing-out sale:

ART. 16. The merchant who wishes to conduct a general closing-out sale of his business must accompany his request for authorization with an inventory of the stock of his goods and indicate the place where they are stored and where they are sold.

Article 17 limits the duration of a general closing-out sale:

ART. 17. The duration of a general closing-out sale must not exceed one year, without an authorization from the police department.

Article 18 prohibits the replenishment of stock during a closing-out sale:

ART. 18. From the date of the request for the authorization to liquidate, every replenishment of goods is forbidden. The contravention of this prohibition, in addition to the penalties fixed by the present law, may lead to the immediate termination of the closing-out sale by revocation of the authorization.

Articles 19, 20, and 21 relate to the frequency and duration of such sales:

ART. 19. An interval of two years at least must elapse between two general closing-out sales conducted by the same merchant.

ART. 20. The duration of a partial liquidation must not exceed one month.

ART. 21. An interval of five months at least must intervene between two partial closing-out sales conducted by the same merchant and for the same kind of goods.

Article 22 provides for the segregation and marking of goods to be sold:

ART. 22. The goods to be closed out must be separated from other goods and marked in a clear manner.

Articles 23 and 24 provide imprisonment up to 8 days or a fine up to 100 francs for violations of articles 3 to 6, 11, 14, 15, 17, 19, 20 to 22, and imprisonment up to 30 days or a fine up to 1,000 francs for violations of articles 1, 7, 8, and 18 of this law.

Unfair-competition law of Aargau.—The law of the Canton Aargau of March 24, 1911,[1] for the suppression of unfair competition and business practices and the regulation of clearance sales comprises 12 sections. Four of these are administrative merely, but the first eight set up specific standards or requirements.

Sections 1 and 4 are aimed at damaging misrepresentations. The former forbids them when wilfully made in regard to a competitor or his products, and the latter prohibits "puffing" or exaggerated claims in regard to one's own establishment, and even forbids a merchant to advertise articles at a specified price unless he has them in stock. Sections 2 and 3 are for the protection of trade secrets and

[1] Gesetz über die Bekämpfung des unlauteren Wettbewerbes und unlauteren Geschäftsgebahrens und das Verfahren bei Ausverkäufen, vom 24. März 1911; Schweizerische Zeitschrift für Strafrecht (1912), p. 94.

prevention of corruption of employees and are somewhat similar to the English Prevention of Corruption Act of 1906 (see p. 534). These four sections dealing with unfair practices are worded as follows:

SEC. 1. Whoever as business proprietor or in the service of such an one circulates untrue statements concerning a competitor or his goods or industrial services against better knowledge or in a grossly negligent manner, which are adapted to injure the competitor's business or credit, is punishable.

SEC. 2. He is punishable—

1. Who induces employees or workmen of a third party, or those who were such, to divulge factory or other business secrets of said third party.

2. Who makes use of or gives out the business secrets of a competitor, which he has learned through his own punishable conduct or through the disloyalty of third parties.

3. Who acquires the knowledge of such secrets by virtue of his office or as a court expert and then makes use of them in competition or gives them out.

4. Who as an employee or workman reveals the secrets of his business to competitors, whether for the purpose of competition or with the intent of doing an injury to the proprietor of the business.

SEC. 3. He is punishable who offers, promises, or grants to the employee or agent of a third party presents or other advantages in order thereby to gain a preference in competition for himself or a third party.

Punishable also is the employee or agent of a business undertaking who, for such a purpose, demands presents or other advantages or allows them to be promised him or who accepts them when offered.

SEC. 4. He is also guilty of punishable unfair competition—

1. Who in published announcements or through other communications that are intended for an extensive group of persons knowingly or in a grossly negligent manner makes untrue statements concerning business relations, for example, concerning the quality or the price of his goods, or concerning the size of the stock, or concerning the source of supply or the method of supply or the occasion for the offer, which statements are adapted to create the impression of an unusually favorable offer.

2. Who announces or lists at a certain price goods which he does not keep, whether he demands a higher price from the purchasers or does not deliver them these goods at all.

3. Who in retail trade for goods which are sold by weight or measure does not announce the price for full weight or measure nor maintain them in a sale.

4. Whoever in retail trade does not give the price of goods in Swiss currency.

Sections 5 to 8 forbid the holding of closing-out sales except under permits issued by the proper authority on payment of fees prescribed. Each application for holding such a sale must show what goods are to be offered and the reason for the sale. For general closing-out sales permits are not to be issued oftener than once in two years, and then only in case damage has been caused by the elements or the party contemplates retirement, removal, or transfer to another town. Stock-reducing sales may be held twice a year, but none can be held during the latter half of December. These four sections are given below:

SEC. 5. The permission of the proper Government department is required for conducting a closing-out sale. Permission is to be granted provided the following legal provisions are met:

The quality and quantity of the goods intended for the closing-out sale, as well as the reason for the closing-out sale, must be indicated in the written application.

The announcement of a closing-out sale may only occur with the statement of the name of the firm.

The closing-out sale shall be conducted only in the existing business premises.

Cut-price sales which have the character of a closing-out sale come under the provisions of this law.

SEC. 6. Permission for a total closing-out sale shall be granted only in case of going out of business, change of ownership, removal of the business to another locality, or accidents due to the elements.

As a rule only those owners of a business are entitled to make application for a permit for a total closing-out sale who have sold similar goods in the same community for at least two years.

The total closing-out sale shall not last longer than a half year.

The repetition of such a sale before the expiration of two years after the close of the preceding one is not permitted.

During a total closing-out sale the replenishment of goods is forbidden.

SEC. 7. Only those owners of a business are entitled to make application for a permit for a partial closing-out sale who during at least one year have sold similar goods in the same community.

For the second half of the month of December no permits shall be granted.

A partial closing-out sale shall be permitted only twice during a year and only with at least a three months' interval. The duration of a partial closing-out sale shall not exceed two weeks.

SEC. 8. For every permit to conduct a partial closing-out sale a fee of from 15 to 40 francs, and to conduct a total closing-out sale a fee of from 50 to 200 francs is to be paid.

Section 10. Germany.

INTRODUCTORY.—In combating the rapid spread of unfair business practices during the last half century German courts did not utilize general provisions of law, as the French courts did, but resorted in the main to special legislation. Although the principle contained in article 1382 of the French Civil Code prevailed in the law of a considerable part of the German Empire prior to the adoption of the present Civil Code, and especially in Prussia, the courts made practically no application of it to the field of unfair competition.[1]

The first attempts of the Imperial Government to curb unfair competition were contained in various laws for the protection of patents, trade-marks, and other forms of industrial property. Of these the most important was the trade-mark law of 1894, which adopted the first provision especially directed against unfair competition. It was shortly followed by the enactment of the special law of May 27, 1896, against unfair competition, which after 13 years was superseded by the new law of June 7, 1909.

Various provisions of the Civil Code, especially sections 823 to 826, have also been applied to cases of unfair competition, as well as several provisions of the Penal and Commercial Codes.

[1] Fuld, Das Reichsgesetz gegen den unlauteren Wettbewerb vom 7. Juni 1909 (Hannover, 1910), S. 2–6; Rosenthal, Handwörterbuch der Staatswissenschaften, 1909, Bd. 8 (Wettbewerb, unlauterer), S. 799.

SPECIAL LAWS.

PATENT LAW.—Section 40 of the patent law of May 25, 1877,[1] in addition to the penalties for infringement of patents, contains two paragraphs relating in a general way to the subject of unfair competition. They are as follows:

With a fine of not more than 150 marks or arrest is punished:

1. Whoever provides objects or their wrappers with a designation which is adapted to cause the mistaken idea that the objects are protected by a patent in accordance with this law.

2. Whoever in advertisements uses a designation upon his signboards, business cards, or in similar announcements which is adapted to cause the mistaken idea that the objects referred to therein are protected by a patent in accordance with this law.

This provision, as will be noted, makes the false claim or misuse of a patent right a penal offense. Civil actions to enjoin the practice and to recover damages can also be brought under other laws.

The practices forbidden by the two paragraphs of this section are regarded as acts of unfair competition, since they awaken the impression that the goods which are falsely claimed to be patented are more useful and more valuable than competing goods. The public may be deceived thereby and competitors injured.[2]

TRADE-MARK LAW.—Three sections of the trade-mark law of May 10, 1894,[3] prohibit the usurpation or misappropriation of certain designations used to distinguish competing products. Section 14 relates to the misappropriation of names, firm names, and trade-marks; section 15 relates to the misappropriation of decorations used as distinctive marks; and section 16 relates to the misuse of designations of provenance of a geographical nature. The language of these three sections is as follows:

SEC. 14. Whoever, knowingly or as a result of gross negligence, unlawfully provides goods, containers, or wrappers, or announcements, price lists, business letters, recommendations, bills, or the like, with the name or the firm name of another, or with a trade-mark protected by the regulations of this law, or puts on sale or sells such goods illegally marked, is bound to compensate the injured party for the damage.

If he has knowingly committed the act, he is also punished with a fine of from 150 to 5,000 marks or with imprisonment up to six months. The criminal prosecution takes place only upon complaint. The recall of the complaint is permissible.

SEC. 15. Whoever, for the purpose of deception in trade and commerce, provides goods or their containers or wrappers, or announcements, price lists, business letters, recommendations, bills, or the like, with a dress which within the particular branch of business is a distinctive mark of another for like goods,

[1] Patentgesetz vom 25. Mai 1877, Reichsgesetzblatt, 1877, S. 501, S. 509.

[2] Allfeld, Grundriss des Gewerblichen Rechtsschutzes, 1910, S. 55.

[3] Gesetz zum Schutz der Waarenbezeichnungen vom 12. Mai 1894, Reichsgesetzblatt, 1894, S. 441.

without his acquiescence, or whoever for the same purpose puts on sale or sells goods marked in this way, is obligated to the injured party for the injury, and is punished with a fine of from 100 to 3,000 marks or with imprisonment up to three months. The criminal prosecution takes place only upon complaint. The recall of the complaint is permissible.

SEC. 16. Whoever falsely provides goods, containers, or wrappers, or announcements, price lists, business letters, recommendations, bills, or the like, with a national coat of arms, or with the name or coat of arms of a place, municipality, or larger communal organization, for the purpose of causing a mistaken idea regarding the quality and value of the goods, or who for a like purpose sells or puts on sale goods so designated, is punished with a fine of from 150 to 5,000 marks or with imprisonment not exceeding six months.

The use of names which serve to designate certain goods according to commercial usage, without intending to designate their provenance, does not fall under this provision.

In addition to registered trade-marks, these three sections protect family names, firm names, the exterior appearance of goods, wrappers or containers, and designations of provenance when used as distinctive marks of products. Section 16 of the law of 1909 against unfair competition affords similar protection to designations of establishments. (See p. 639.) The designations of products which have become generic are not protected by these provisions. Likewise according to section 16 of the Trade-Mark Law, designations which no longer refer to the provenance, but have become the common name of goods, are specially excepted.

The distinctive marks specified in these sections may be affixed to the products which they distinguish or they may be used on announcements and advertisements of various kinds regarding the goods. The use of such distinctive marks by others is considered an act of unfair competition, since it leads to confusion between products and thereby injures the rightful possessors.

During the passage of this measure in 1894 another provision of much broader scope was proposed, but was finally dropped, with the understanding that a special law regarding unfair competition should be introduced. Two years later, in accordance with this arrangement, the law of May 27, 1896, was enacted.

UNFAIR COMPETITION LAW OF 1896.—The Law of May 27, 1896,[1] for the Suppression of Unfair Competition contained 16 sections, which dealt with the following practices:[2]

1. Deceptive advertising of one's own goods or services—sections 1 to 4, inclusive.

2. Deception in respect to quantity or quality of goods in retail trade—section 5.

[1] Gesetz zur Bekämpfung des unlauteren Wettbewerbes vom 27. Mai 1896; Reichsgesetzblatt, 1896, S. 145–149.

[2] Wassermann, Der Unlautere Wettbewerb nach Deutschem Recht (Leipzig, 1907), S. 9.

3. Disparagement or misrepresentation of another's business, goods, services, etc.—sections 6 and 7.

4. Misappropriation of another's business designations—section 8.

5. Unauthorized disclosure of trade secrets—sections 9 and 10.

The last five sections of the law dealt with matters of procedure, compensation, etc.

The law of 1896 had a salutary effect in curbing the several varieties of unfair competitive acts specifically mentioned. All other forms of unfair competition remained beyond the reach of the law until this weakness was remedied by the application of section 826 of the new Civil Code, which became effective in 1900, and the enactment in 1909 of a new law against unfair competition of much broader scope, which supplanted the earlier law.

UNFAIR COMPETITION LAW OF 1909.—The Law of June 7, 1909,[1] against Unfair Competition preserves the principal features of the earlier law, but makes certain additions and modifications which experience showed to be necessary. The most important additions are a general clause fashioned after section 826 of the Civil Code but confined to business affairs, a section relating to the corruption of employees, and several sections relating to bankrupt and closing-out sales. The law also extends to the employer, under certain circumstances, liability for the unfair acts of his employee. The penalties are also increased.

The new law contains in all 30 sections, which relate to the following practices:

1. Acts in business which are contrary to good morals—section 1.

2. Deceptive advertising of one's own goods or services—sections 3 to 5.

3. Methods of advertising and conducting closing-out sales or sales of goods from a bankrupt stock—sections 6 to 10.

4. Deception in respect to quantity or quality of goods in retail trade—section 11.

5. Bribery or corruption of employees for competitive purposes—section 12.

6. Disparagement or misrepresentation of another's business, goods, or services—sections 14 and 15.

7. Misappropriation of another's business designations—section 16.

8. Unauthorized disclosure of trade secrets—sections 17 to 20.

Sections 2, 13, and 21 to 30 contain provisions regarding definitions, procedure, penalties, compensation, the rights of foreigners, etc.

General clause.—Section 1 of the law of 1909 provides that acts in business which are repugnant to good morals afford ground for an

[1] Gesetz gegen den unlauteren Wettbewerb vom 7. Juni 1909; Reichsgesetzblatt, 1909, S. 499–506. See full translation on p. 806.

action to enjoin the practices and to recover damages. According to Finger, this general provision dominates the whole law of 1909.[1] In respect to unfair competitive practices in business, its scope is as broad as is that of article 1382 of the French Civil Code. Any competitive act that would be considered by the French courts as "disloyal" (déloyale) would be considered by the German courts as "against good morals" (gegen die guten Sitten).[2]

The far-reaching scope of the general clause makes possible the correction of countless competitive acts which formerly could not be dealt with at all or only in an incomplete way. The field of application, according to Fuld, is almost unlimited and the power which section 1 gives to the judge extraordinary.[3]

Inasmuch as the application and interpretation of this section by the courts is similar to section 826 of the Civil Code, the discussion of it is given below under the head of general provisions. (See p. 647.)

Deceptive advertising.—Sections 3, 4, and 5 of the law of 1909 prohibit the circulation of statements which falsely represent one's business in order to attract trade. The language of these sections is as follows:

SEC. 3. Whoever in public advertisements or in communications intended for an extensive group of persons makes incorrect statements regarding business relations, especially regarding the quality, the origin, the method of production, or the scale of prices of goods or industrial services, regarding the kind of supply or the source of supply of goods, regarding the possession of marks of distinction, regarding the cause or the purpose of the sale, or regarding the quantity of the stocks, which are adapted to create the impression of an especially favorable offer, is subject to an action to desist from such incorrect statements.

SEC. 4. Whoever, with the intention to create the impression of an especially favorable offer, knowingly makes untrue statements and statements adapted to mislead, in public advertisements or in communications intended for an extensive group of persons, regarding business relations, especially regarding the quality, the origin, the method of production, or the scale of price of goods or industrial services, regarding the kind of supply or the source of supply of goods, regarding the possession of marks of distinction, regarding the cause or the purpose of the sale, or regarding the quantity of the stocks, is punished with imprisonment up to one year and with a fine up to 5,000 marks, or with one of these penalties.

If the incorrect statements specified in paragraph 1 were made in a business establishment by an employee or representative, then the proprietor or manager of the concern is punishable, besides the employee or representative, if the act happened with his knowledge.

SEC. 5. The use of names which in business dealings serve to specify certain goods or industrial services, without intending to specify their provenance, is not included under the provisions of sections 3 and 4.

[1] Finger, Reichsgesetz gegen den unlauteren Wettbewerb, Berlin, 1910, S. 14.
[2] Fuld, op. cit., S. 42.
[3] Fuld, op. cit., S. 75.

In the sense of the provisions of sections 3 and 4, pictorial presentations and other contrivances which are calculated and adapted to replace such statements are to be regarded in the same way as the specified statements.

The intention of these sections is to prevent fraudulent advertisements used to divert a competitor's customers.

Sections 3 and 4 cover exactly the same classes of incorrect statements, but section 3 provides only a civil remedy, while section 4 provides penalties of fine and imprisonment if the acts specified were knowingly done with the intention of deceiving the public. Violation of section 4 occurs if the person circulating the statements knew that they were untrue and calculated to mislead. The careless or negligent circulation of incorrect statements is not included.[1]

In accordance with section 13, an action for damages can be brought against the one circulating incorrect statements in violation of section 3 if he knew or should have known that they were untrue, but printers, publishers, etc., must have actual knowledge of the untruthfulness of such statements before damages can be recovered. The part of section 13 relating to this matter is as follows:

For compensation of the damage arising from violations is responsible: (1) Whoever in case of section 3 knew or should have known the incorrectness of the statements made by him. Against editors, publishers, printers, or distributors of printed periodicals the claim for compensation of damage can be made effective only if they knew the incorrectness of the statements.

Section 5 is new. The first paragraph exempts from the provisions of sections 3 and 4 designations of provenance which have become generic, such as Carlsbad salts, Swiss cheese, Cologne water, etc. As noted above, a similar exemption was made in section 16 of the trademark law which prohibits the use of false statements of geographic provenance. (See p. 622.)

The second paragraph of section 5 places all pictorial, symbolical and graphical presentations used in advertisements within the scope of sections 3 and 4, thus correcting a weakness which had existed in the earlier law. The use of such devices to falsely represent one's business is now dealt with in the same manner as false statements. Under this provision, for instance, a suit can be brought against a dealer in firearms who puts in his advertisements a picture of a large plant, spacious workrooms, etc., when in reality he has only a small workshop in an attic with few workmen.[2]

The expression "in public advertisements or in communications intended for an extensive group of persons," used in sections 3 and 4 and also in later sections, includes practically every form of announcement or communication, printed or oral, not directed to particular persons. Common forms of public advertisements are news-

[1] Fuld, op. cit., p. 158.

[2] Finger, op. cit., p. 127.

paper insertions, placards, signs on roofs of buildings, in show windows and on theater curtains, notices affixed to goods, or to their wrappers or containers, and catalogues distributed to the general public. Common forms of "communications" are annual reports of corporations, insurance companies, etc., mimeographed, printed, or otherwise manifolded reports of merchants to their patrons, and the oral statements of accounts of a business manager of a retailers' association.[1]

How large a circle of persons may be regarded as "an extensive group of persons" can not be determined according to any general rule, but depends upon the circumstances in each case. A personal letter to one or even to several individuals would be excluded. Actions against persons making untrue statements to individuals are possible, however, under section 1 of the law.

The criterion of whether a statement is incorrect or untrue is the sense in which the public, or that part of the public for whom it is intended, accepts it. It is not necessary, in order to obtain conviction, to show that persons have actually been deceived by them. The suppression of a fact essential to the judgment of the public is also considered as an incorrect or untrue statement within the meaning of these provisions. The same is true of a correct statement presented in such a way as to convey an erroneous impression to the casual reader. A good example is that of a dentist who, in a newspaper advertisement, puts the words "teeth, 1 mark," in large Latin type and the words "exclusive of setting" in small German letters.[2] An ambiguous statement may also be incorrect within the meaning of section 3.

Not all incorrect or untrue statements are prohibited by these sections, but only such as are adapted "to create the impression of an especially favorable offer," and thereby to divert the clientele of a competitor. Comic and harmless exaggerations, for example, which can easily be recognized by everyone as such, are not considered as violations of sections 3 and 4. The expression "adapted to mislead" contained in section 4 has the same significance as the expression "adapted to create the impression of an especially favorable offer" used in section 3. Whether the incorrect or untrue statements contained in an advertisement or announcement would mislead is in each case a question of fact, in the determination of which the courts take into consideration the average intelligence of the class of persons concerned, their manner of living, their ability to judge, their inexperience and credulity, the local customs prevailing, and other factors of like nature. It is not necessary to show that customers have actually been misled and diverted by such statements.

[1] Fuld, op. cit., pp. 87–90; Finger, op. cit., p. 38.

[2] Fuld, op. cit., pp. 93–96.

The incorrect or untruthful statements forbidden by sections 3 and 4 must also be in regard to "business relations." This term is very broad, including all relations either directly or indirectly affecting business. It may even include statements regarding personal and family relations. Sections 3 and 4 specify some eight classes of untruthful statements which are prohibited, viz:[1]

1. *Quality of goods.* Under this head come incorrect statements regarding the external or internal characteristics, properties, or qualities, such as "bound in leather," "four-ply linen collars," "English cloth," etc.

2. *Origin of goods.* This class was inserted in the new law to cover any cases not included in the first class. If a horse dealer, for example, designates a horse as of "Graditz stock," the name refers more to the origin than to the characteristics of the animal.

3. *Method of production.* This class includes all such expressions falsely made, as "guaranteed first-class work," "made by hand," "without artificial perfuming," etc.

4. *Scale of prices.* Under this classification belong all such statements, if untrue, as "only one price," "selling at factory price or at cost," "special cut-price day," etc.

5. *Kind or source of supply.* This class includes such statements, if untrue, as "direct from the factory," "packed in ice," "Strassburg pie," "Jamaica rum," etc.

6. *Possession of marks of distinction.* Under this head come such statements, if untrue, as "doctor of dental surgery," patented," "awarded first prize," etc.

7. *Cause or purpose of a sale.* In this classification are included all untrue statements regarding sales, such as "fire sale," "damaged by water," "on account of alterations," etc., which are not covered by the special provisions of sections 6 to 10.

8. *Quantity of stocks on hand.* This is a new class which includes, among other things, the advertisement of a certain stock of goods for sale when a merchant does not actually have such stock on hand.

The special mention of these eight classes of incorrect statements does not exclude other forms, such as the date of beginning business, the composition of goods of all kinds, the number of subscribers, etc.

A few cases will illustrate the application of these sections to unfair advertising.

A dealer advertised a sale of goods at factory prices. He also stated that the factory employed 300 persons. It was shown that his prices were higher than those of the manufacturer. The court held that he was guilty of an incorrect statement in the sense of section 3, since his advertisement was calculated to make the public believe not only that it was purchasing at a factory price, but also at the price of a large factory.[2]

A photographer placed in his window a placard advertising one dozen "carte-de-visite" pictures at 1.80 marks and one dozen cabinet pictures at 4.80 marks. The samples of photographs shown were all

[1] Fuld, op. cit., pp. 111–143.

[2] Oberlandesgericht Celle, Urt. v. 12. Feb. 1910; cited by Seelow, Sammlung neuer wichtiger Entscheidungen auf Grund des Gesetzes gegen den unlauteren Wettbewerb, S. 27.

mounted. Prospective customers were informed, however, that mounted photographs were higher. The Imperial Court held this act to be a violation of section 4 of the law, since the defendant intended "to deceive the public by creating the impression of a specially favorable offer."[1]

A cigarette manufacturer in Frankfurt a. M. used the name of an Egyptian company on his product. The Imperial Court held this to be an incorrect statement regarding business relations in the sense of section 3 of the law against unfair competition, notwithstanding the plea that the Frankfurt concern had been established by the Egyptian company.[2]

A cigar manufacturer in Bremen, Germany, who used Havana leaf designated his product as "Genuine Havana cigars." The Imperial Court held that the average consumer understood by such a designation an imported cigar, and that, therefore, the manufacturer, in using this designation, had made an incorrect statement regarding the origin of his goods, which, considering the cheap price, created the impression of an especially favorable offer.[3]

A newspaper publisher promised to insure subscribers to the amount of 1,000 marks against death by accident. It was shown that the conditions imposed were not those customary in the insurance business, but were wholly exceptional and unexpectedly severe, so that they would rarely be fulfilled. As a result the impression of an ordinary insurance to the amount of 1,000 marks was created, while in truth an actually effective insurance with which the subscribers reckoned and which had been advertised did not exist. Furthermore, the defendant knew that his announcement could be understood in a sense not corresponding to the actual facts. The Imperial Court held, therefore, that such acts violated section 4 of the law against unfair competition.[4]

Bankrupt and closing-out sales.—The law of 1909 contains five sections dealing specifically with the manner of advertising and conducting closing-out sales and sales of goods from a bankrupt stock. Violations of these provisions are made penal offenses, punishable in most cases with fine or imprisonment or both. In accordance with section 13, civil suits to enjoin the acts and to recover damages can also be brought against the offender. The language of these sections is as follows:

SEC. 6. If in public advertisements or in communications intended for an extensive group of persons, the sale of goods is announced, which came from a

[1] Reichsgericht, Urt. v. 6. Dezember 1910; cited by Seelow, op. cit., p. 46.
[2] Reichsgericht, Urt. v. 12. Juni 1913; Das Recht, 1913, Beilage (Deutschlands Oberstrichterliche Rechtsprechung) No. 2501.
[3] Reichsgericht, Urt. v. 10. März 1914; Das Recht, 1914, Beilage No. 1487.
[4] Reichsgericht, Urt. v. 22. Oktober 1912; Gewerblicher Rechtsschutz und Urheberrecht, 1913, p. 19.

bankrupt stock but no longer belong to such bankrupt stock, it is forbidden to make any reference to the provenance of the goods from a bankrupt stock.

Violations of this provision are punished with a fine up to 150 marks or with arrest.

SEC. 7. Whoever in public advertisements or in communications which are intended for an extensive group of persons announces the sale of goods under the designation of a closing-out sale is obliged in the announcement to give the reason which has given occasion to the closing-out sale.

Through the superior administrative authorities, after hearing given to the proper legal representatives of industry and trade, regulations may be made for the announcement of certain kinds of closing-out sales to the effect that notices regarding the reason of the closing-out sale and the time of its beginning be provided at a place to be designated by them, as well as a list furnished of the goods to be sold out.

The inspection of the list is permitted to everyone.

SEC. 8. Whoever in case of the announcement of a closing-out sale places goods for sale which have been procured merely for the purpose of a closing-out sale (so-called replenishment of goods) is punished with imprisonment up to one year and with a fine up to 5,000 marks or with one of these penalties.

SEC. 9. The announcement of a closing-out sale within the meaning of section 7, paragraph 2, and of section 8 applies also to every other announcement which relates to the sale of goods on account of winding up business, giving up a particular kind of goods, or getting rid of a specific stock of goods from the existing supply.

With respect to season and inventory sales, which in the announcement are specified as such and are customary in regular business, the provisions of sections 7 and 8 have no application. Concerning the number, time, and duration of the customary season and inventory sales, the superior administrative authorities may make regulations after hearing the proper legal representatives of industry and trade.

SEC. 10. With fines up to 150 marks or with arrest is punished:

(1) Whoever, contrary to the provisions of section 7, paragraph 1, neglects in the announcement of a closing-out sale to give the reason which has given occasion to the closing-out sale;

(2) Whoever violates the regulations issued on the basis of section 7, paragraph 2, or in complying with these regulations makes incorrect statements;

(3) Whoever violates the regulations provided by the superior administrative authorities on the basis of section 9, paragraph 2, sentence 2.

The purpose of these provisions is to restrict the manner of advertising and conducting certain types of sales which are frequently used as a means to lure people away from the shops they usually trade with and to dispose of goods of inferior quality.

Section 6 makes it unlawful to advertise the sale of goods from a bankrupt stock unless they actually belong to such stock at the time the sale is announced. Objects which are not subject to legal attachment do not belong to the bankrupt stock. Such notices as "Sale of bankrupt goods and other goods," "Sale at the prices fixed by the trustee in bankruptcy," "Purchased from a trustee in bankruptcy," where the goods do not actually belong at that time to a bankrupt stock, are prohibited.[1] The prohibitions of section 6 relate only to

[1] Fuld, op. cit., p. 214.

goods which at some time were part of a bankrupt stock, but which have passed out of the hands of the trustee. The advertising of a bankrupt sale of goods which never formed a part of a bankrupt stock is not prohibited by this provision, but by sections 3 and 4.

A fine not exceeding 150 marks or arrest is prescribed for violation of this section. In addition section 13 authorizes an injured party to bring action to enjoin and to recover damages.

The following cases illustrate the application of this provision:

A dealer after buying some goods from a bankrupt stock announced a closing-out sale of bankrupt goods on a certain day. The goods were not delivered to him until the day before the sale, which was some days after the announcement had been made. The Imperial Court held that, nevertheless, section 6 had been violated, since on the day of the sale the goods no longer belonged to the bankrupt stock.[1]

A merchant contracted with an administrator in bankruptcy to handle a bankrupt stock, guaranteeing him 30,000 marks for it and three-fourths of all the receipts above this amount. The merchant then advertised a closing-out sale of bankrupt goods. Suit was brought to enjoin the merchant from making such an announcement. The lower court granted the injunction, but on appeal the judgment was reversed by the Superior Court of Celle on the ground that the goods had not entirely passed out of the hands of the administrator, since he still had a pecuniary interest therein.[2]

In another case the defendant conducted a shoe store in which he sold some shoes which his brother had obtained from a bankrupt stock. In announcing the closing-out sale of these goods he used the following advertisement:

> Shoes! The large stock of goods obtained from a bankrupt stock is now being sold at extremely cheap prices.

This announcement was held by the court to be a violation of section 6 of the law, since it referred to a bankrupt stock when the shoes no longer belonged to such stock. Appeal was taken on the ground that the reference to the provenance of goods in the statement of the reason for a closing-out sale required by section 7 was not a violation of section 6. The appeal was rejected, the Imperial Court holding that the prohibition of section 6 is sweeping and without exception, and that it is based on the consideration that every reference to the provenance of goods from a bankrupt stock exerts a real and unwarranted attraction upon the public and injures honest business men.[3]

[1] Reichsgericht, Urt. v. 26. Mai 1911; cited by Seelow, op. cit., p. 66.

[2] Oberlandesgericht Celle, Urt. v. 19. Juni 1912; cited by Seelow, op cit., p. 67.

[3] Urt. v. 4. April 1913; Entscheidungen des Reichsgerichts in Strafsachen, Bd. 47, S. 117.

Section 7 regulates the manner of advertising closing-out sales. Paragraph 1 provides that every person announcing such a sale must state in his advertisement the reason or motive for closing out goods in this manner. The Imperial Court has decided that an announcement of a closing-out sale, which gives only the words "closing out" and not the cause, violates paragraph 1 of section 7 and paragraph 1 of section 10. The superior court of Colmar has decided that the cause of a closing-out sale must not only be given as a matter of form, but must be seriously intended and really pertinent. Only such circumstances can be given as reasons for a closing-out sale as would justify the forced sale of goods.[1] Giving an untruthful reason is made a misdemeanor by section 10 and punished with a fine of 150 marks or with arrest.

According to the second paragraph of section 7 the administration of this provision in certain cases is delegated to local authorities who may designate a place for posting the announcement of the reasons for selling out, the time of the sale, and a list of the goods to be disposed of. This delegation of authority was made in order to meet the special economic and local needs of different business districts.[2]

The superior administrative authorities are not authorized by the above section to regulate all closing-out sales. The Imperial Court has repeatedly held that they can only apply the regulations to special kinds of closing-out sales.[3]

In a recent case involving this point a local magistrate made a regulation which applied to all closing-out sales conducted for the purpose of clearing or reducing the stock of goods. The Imperial Court held that this regulation embraced every kind of closing-out sale, and for this reason the police magistrate had exceeded his authority.[4]

Every announcement which contains the words "closing out" or "selling out," or any expression which conveys the same idea, comes within the meaning of this provision. The Imperial Court has held that such expressions as "total sale," "clearance sale," and "rapid and cheap sale" may be equivalent to closing-out sale.[5] Any other form of sale, such as fire sale, remnant sale, special sale, etc., does not come within the meaning of this section, but the false advertising of such sales is prohibited by sections 3 and 4.

Section 9, first paragraph, provides that the closing out may be of an entire business, of a branch of a business, or of a particular line of goods. According to the second paragraph of section 9, sea-

[1] Gewerblicher Rechtsschutz und Urheberrecht, 1911, S. 68.
[2] Fuld, op. cit., p. 222.
[3] Urt. v. 16. Juni 1911; Entscheidungen des Reichsgerichts in Strafsachen, Bd. 45, S. 16.
[4] Urt. v. 12. März 1913; Entscheidungen des Reichsgerichts in Strafsachen, Bd. 47, S. 88.
[5] Urt. v. 26. Mai 1911; Entscheidungen des Reichsgerichts in Strafsachen, Bd. 45, S. 45; Das Recht, 1911, Beilage No. 3146.

son and inventory closing-out sales are exempted from the provisions of section 7, since in certain lines of business they are considered a necessary means of disposing of goods, such as those of changing style, in order to make room for a new stock.

Section 8 prohibits a person who intends to hold a closing-out sale from adding goods to the original stock after the announcement of the sale has been made. The purpose of this provision is to prevent the prolongation of such sales, which tend to divert the trade of others engaged in the same business. A rather common practice covered by this provision was the buying up and selling off of liquidated or bankrupt stocks, a practice which had resulted in much injury to regular merchants.[1]

The penalty for violation of this section is imprisonment for not more than one year or a fine of not more than 5,000 marks, or both. Actions to enjoin the practice and to recover damages can also be brought against those violating the provisions of this section in accordance with the provisions of section 13. According to section 9, second paragraph, season and inventory sales are exempt from the provisions of this section.

There have been numerous cases before the courts involving the interpretation of sections 8 and 9. A few examples follow:

A merchant advertised a Christmas closing-out sale at one of his stores, and during the sale brought in some goods from another of his stores. Suit was brought for violation of sections 8 and 9 of the law of 1909 against unfair competition. The questions involved were whether the Christmas sale should be considered a seasonal sale in the sense of section 9, and also whether the bringing in of goods from one store to another operated by the same proprietor was a violation of section 8. The lower court held that a Christmas closing-out sale could not be considered as a seasonal sale, and also that the transferring of goods from one store to another of the same concern during the sale constituted a violation of section 8, since the goods were not originally procured expressly for that store and were shipped after the announcement of the closing-out sale had been made. The Imperial Court, however, overruled the lower court on both of these findings.[2]

The defendant conducted a shoe business at a given place. Prior to December 31, 1910, he had a second shoe store, under a different name, which connected with the former by a little interior yard or court. The lease of the latter store was to be given up on January 1, 1911. Thereupon he advertised in the show window of this second store and also in the papers a clearance sale of the stock at great reductions

[1] Fuld, op. cit., p. 231.

[2] Urt. v. 20. September 1910; Entscheidungen des Reichsgerichts in Strafsachen, Bd. 44, S. 61.

on account of giving up the lease. During the sale he brought in some new goods from his main store for the purpose of sale. The lower court convicted him of violating section 4 and also sections 8 and 9. The appeal taken by defendant was on the ground that he had not advertised a closing-out sale, since his main business was not ended. The Imperial Court rejected this plea, holding that a closing-out sale can take place on the giving up of a certain class of goods or a certain stock out of an existing stock, and that the public in this case understood from the announcement that the whole stock in the second store was to be sold out, there being no mention of the main store. Hence the sale advertised by the defendant was a partial closing-out sale in the sense of section 9, paragraph 1, and the bringing in of other goods after the sale was announced was a violation of section 8. Incidentally the Imperial Court stated that this decision was not contrary to the above decision of September 20, 1910, for the facts were essentially different in the two cases.[1]

Deception concerning quantity or quality of goods.—Section 11 of the law of 1909 is identical with section 5 of the old law except for a few slight changes in the language of the first paragraph. In contrast with the preceding sections, which are intended for the protection of competitors, its aim is more to protect the public against merchants who practice deception in the quantity of goods. According to Wassermann, in certain branches of trade, especially in the sale of yarn and beer, the practice had grown up of accompanying a price reduction with a reduction in the size of the package or container in which goods were usually sold and at the same time advertising the reduction in price in such a way as to convey the erroneous impression that the reduction was made on the regular-sized packages.[2] For instance, a common practice of a large number of merchants was to divide a pound of cotton knitting yarn or zephyr into 12, 13, or even 14 parts, when it was usually divided into 10 parts weighing 50 grams each, and at the same time offering it to the public at an apparent reduction in price.[3]

The provisions of section 11 are as follows:

SEC. 11. By decision of the Federal Council it may be determined that certain goods in retail trade may be sold or offered for sale only in prescribed units of number, volume, or weight, or with a description upon the article or its covering concerning the number, measure, weight, place of production, or place of origin of the article.

For the retail trade in beer in bottles or jugs the description of the content may be prescribed with provision of suitable limits of toleration for error.

[1] Urt. v. 6. Oktober 1911; Entscheidungen des Reichsgerichts in Strafsachen, Bd. 45, S. 168.

[2] Wassermann, op. cit., p. 79.

[3] Finger, op. cit., p. 143.

The regulations prescribed by the Federal Council are to be published in the Imperial Gazette and laid before the Imperial Diet immediately or at its next meeting.

Conduct contrary to the regulations of the Federal Council is punished with a fine up to 150 marks or with arrest.

This provision authorizes the Federal Council (Bundesrat) to issue decrees regulating the sale of certain goods in the retail trade, by which is meant trade between the retailer and consumer. All wholesale transactions as well as sales in the export and import trade are excluded. The regulations decreed may be in regard to the (1) unit of number, such as dozen, gross, etc.; (2) unit of weight, such as kilogram; (3) unit of measure, such as meter or liter; and (4) the quality of the goods in so far as shown by the name of the place of production or place of origin placed on the wrappers or containers.[1]

From 1896 to 1909 the Federal Council exercised the power conferred on it by the corresponding section of the law of 1896 in only three cases.[2] On November 20, 1900, it issued a decree regulating the sale of yarn in the retail trade. A supplementary decree was issued in 1902. On December 4, 1901, a decree was issued regulating the retail trade in candles. No regulations have thus far been made, under section 11 of the law of 1909, although agitation for such regulation has existed, especially for chicory and soap.[3]

In addition to the penalty of fine or arrest prescribed by this section, civil actions to enjoin the practices and to recover damages can be brought in accordance with section 13.

Bribing or corrupting employees.—Section 12 was inserted in the new law to cover certain unfair practices which became prevalent after the passage of the old law in 1896. This section makes it unlawful to secure a competitive advantage in obtaining goods or industrial services by corrupting in any manner the employees or representatives of a business concern. Violation of this provision is punished by imprisonment for not more than one year or with a fine not exceeding 5,000 marks, or both. A like penalty is imposed upon the employee or representative accepting the present or other favor offered for the corrupt purpose.

The language of section 12 is as follows:

SEC. 12. Whoever in business dealings for the purpose of competition offers, promises, or grants presents or other advantages to the employee or representative of a business, in order to obtain, through improper conduct of the employee or representative an advantage for himself or a third person in the supply of goods or industrial services, is punished with imprisonment up to one

[1] Fuld, op. cit., pp. 257, 258.

[2] Kahn und Weiss: Wettbewerbsgesetz, München, 1910, p. 172; Fuld, op. cit., p. 262.

[3] Oppenheimer, The German Law of 1909 against Unfair Competition; No. 683 miscellaneous series, British diplomatic and consular reports, reprinted in Hearings before the House Judiciary Committee, 63d Cong., 2d sess. (1914), pt. 29, pp. 1474, 1482.

year and with fine up to 5,000 marks, or with one of these penalties, unless a heavier penalty is incurred under other legal provisions.

The same punishment applies to the employee or representative of a business establishment who in business dealings demands, allows to be promised, or accepts presents or other advantages in order that he, through improper conduct, may give another a preference in the supply of goods or industrial services.

In the judgment the thing received or its value is to be declared forfeited to the State.

This section is very broad in scope. The term "business establishment" (geschäftlicher Betrieb) embraces every undertaking or activity carried on for profit. Doctors, lawyers, and notaries come within the meaning of this term, but a private household does not, so that the corrupting of a domestic servant in order to receive the patronage of the master would not be a violation of this provision.[1]

The term "gifts or other advantages" (Geschenke oder andere Vorteile) was taken from section 331 of the Penal Code. It includes entertainment, theater or concert tickets, a ride in an automobile, the lending of a book, in fact, every favor which has value to the employee or agent. The bestowal of such favors upon the wife, children, or other members of the family of the employee may come within the meaning of this provision.[2]

The giving, offering or promising of presents or other advantages constitutes a misdemeanor if done with the intention of inducing the employee to act corruptly so that a competitive advantage can be secured in obtaining goods or industrial services, by which is meant such advantages as a preference over competitors in the sending of orders, in the delivery, purchase or examination of goods, or in terms of settlement.[3] The one offering the present is guilty, even though his offer is rejected. It is the duty of the court to determine whether the act desired of the employee is corrupt, but it is not necessary to ascertain whether the act is contrary to the employee's obligations to his employer. The determination of corruptness has made prosecution under this provision difficult. In cases where the corruptness of the act can not be established the giving or receiving of presents may be prosecuted under section 1 of the act as being contrary to "good morals."

The employee is guilty if he accepts or in any way encourages the offer of a present given for a corrupt purpose. In other words, failure to reject an offer or promise when received makes the employee liable. It is not necessary to show that the promise or offer was actually fulfilled.

In addition to the penalties prescribed by this section civil actions to enjoin the practices and to recover damages may be brought for violation of its provisions in accordance with section 13. The action

[1] Fuld, op. cit., pp. 272, 273. [2] Fuld, op cit., p. 272. [3] Finger, op. cit., p. 164.

to enjoin may be brought against the proprietor or manager of an establishment as well as against his employee or representative if the act was done with his knowledge. According to the last paragraph of section 12 the present given to an employee or its value is forfeited to the State.

Although this section was inserted in the law under great pressure from the large industrial concerns, it is stated that practically no cases were brought under it until after the formation of the Society for the Prevention of Bribery (Verein gegen das Bestechungsunwesen), about the middle of 1911.[1] The following is a recent case successfully prosecuted under this provision:

An agent of an automobile concern promised a chauffeur a present to persuade his employer to purchase an automobile from him in preference to one of a competing make. The competing concern brought suit against him under section 12. The defendant claimed that this section was inapplicable on the ground that the employer purchased the car for his personal use and the chauffeur was not an employee of a business establishment in the sense of this provision. It was shown, however, that the employer used the car in going back and forth from his home to his place of business, that the expense of the car was paid by the mining concern of which he was director, and that the chauffeur was a salaried employee of the mining concern and that this was known to the defendant. The lower court convicted the defendant, and the Imperial Court upon appeal affirmed the judgment.[2]

Disparagement or misrepresentation.—Sections 14 and 15 of the law of 1909 correspond in a general way with sections 6 and 7 of the law of 1896. These original sections were in turn similar to sections 186 and 187 of the Penal Code and section 824 of the Civil Code. Section 14 of the new law prohibits the circulation of statements injurious to the business or credit of a competitor if the statements can not be proved and provides civil remedies for the violation of its provisions. Section 15 makes the circulation of such statements a penal offense punishable with fine and imprisonment if the statements were intentionally false. The two sections are intended to prevent the criticism or misrepresentation of a competitor's business in contrast with sections 3 and 4, which are aimed at the misrepresentation of one's own business.

The language of sections 14 and 15 is as follows:

SEC. 14. Whoever for the purpose of competition asserts or circulates facts concerning the business of another, concerning the personality of the owner or manager of the business, concerning the goods or industrial services of an-

[1] Oppenheimer, op. cit., pp. 1483–1484.

[2] Urt. v. 23. Mai 1913; Entscheidungen des Reichsgerichts in Strafsachen, Bd. 47, pp. 183, 184.

other, which are adapted to injure the operation of the business or the credit of the owner, is bound, in so far as the facts are not demonstrably true, to make compensation for the damage arising therefrom. The injured party may also demand that the assertion or circulation of the facts cease.

If it relates to confidential communications and if the communicant or the recipient of the communication has a rightful interest therein, then the action to desist is only permissible when the facts are asserted or circulated contrary to the truth. The claim for compensation of damages can be made only if the communicant knew or should know the incorrectness of the facts.

The provisions of section 13, paragraph 3, have corresponding application.

SEC. 15. Whoever against better knowledge asserts or circulates facts contrary to the truth concerning the business of another, concerning the personality of the owner or manager of the business, concerning the goods or industrial services of another, which are calculated to injure the operation of the business is punished with imprisonment up to one year and with a fine up to 5,000 marks, or with one of these penalties.

If the facts specified in paragraph 1 are asserted or circulated by an employee or representative in a business establishment, then the owner of the establishment, besides the employee or representative, is punishable, if the act happened with his knowledge.

Sections 14 and 15 contain the expression "asserts or circulates facts," in contrast with the expression "makes incorrect statements in public advertisements or in communications intended for an extensive group of persons" found in preceding sections. It is a violation of section 14 to make an injurious assertion about a competitor even to a single individual. The word "fact" (Tatsache) has a narrower interpretation than "statement" (Angabe). It includes every external or internal proceeding or occurrence which is susceptible of examination and proof, but excludes personal opinions, beliefs, etc., not capable of proof.[1]

The conditions specified by section 14 are (1) that the assertions of fact must be regarding the person of a proprietor or manager, or regarding his goods or industrial services; (2) that they must be of a nature to injure either the business or the credit of the proprietor; and (3) that they must be incapable of proof. Assertions regarding employees, those which injure only the personal reputation of a proprietor,[2] and those which are demonstrably true are excluded. In this respect the German law is directly at variance with French procedure under article 1382, which makes the circulation of injurious statements ground for an injunction even if they are true.[3]

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[1] Fuld, op. cit., p. 330; Finger, op. cit., p. 214.

[2] Assertions which injure the personal reputation of another are made penal offenses under section 186 of the Penal Code, the language of which is as follows:

"Whoever asserts or circulates a fact in reference to another which is adapted to bring such person into contempt or to degrade him in public opinion is punished for insult with a fine up to 600 marks or with arrest or with imprisonment up to one year if this fact is not demonstrably true, and with a fine up to 1,500 marks or imprisonment up to two years if the insult is committed publicly or by the circulation of writings, pictures, or representations."

[3] Finger, op. cit., pp. 227, 242.

Certain communications of a confidential nature in which the communicant has a rightful interest are exempted from the general prohibition by the second paragraph of section 14. The term "rightful interest," which was borrowed from section 193 of the Penal Code, excludes all interests contrary to right or to morality or which in no way affect the communicant himself. According to Oppenheimer this exception was made in behalf of inquiry agencies, which collect and disseminate information regarding the standing of concerns and which are regarded in Germany as performing a legitimate and useful service.[1]

Section 824 of the Civil Code[2] is also applicable to statements which injure another's credit, but since the enactment of the law of 1909 it has apparently had practically no application to such statements when made for the purpose of competition in business.

Section 15 differs from section 14 in the following particulars: (1) The person circulating the injurious statements must know that they are untrue; (2) the statements must be untrue and not merely incapable of proof; (3) only injury to the business and not to the credit of the proprietor is specified, since the latter is covered by section 187 of the Penal Code;[3] (4) there is no provision for rightful interest such as is contained in the second paragraph of section 14; and (5) it is not necessary that the act be for the purpose of competition. By omitting this requirement section 15 is not confined entirely to the field of unfair competition.

Under section 14 the defendant must prove that his statements are true, whereas under section 15 the plaintiff must prove that they are untrue.

Examples of assertions prohibited by section 14, if incapable of proof, are (1) that a competitor's patent has expired; (2) that a competitor's beer has no taste; (3) that a competitor has been ordered to efface his trade-mark. The assertion that the goods of a competitor are too dear or that they are poor is not a fact as above defined, but an expression of opinion and therefore not prohibited.[4]

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[1] Oppenheimer, op. cit., pp. 1484–1485.

[2] SEC. 824. Whoever asserts or circulates a statement contrary to the truth which is adapted to injure the credit of another or to bring about other disadvantages for his earnings or prosperity must compensate the other for the injury caused, even if he does not know at all the untruth but should know it.

The communicant will not be liable for compensation of damage for a communication whose untruth is unknown to him if he or the recipient of the communication has a lawful interest therein.

[3] SEC. 187. Whoever against his better knowledge asserts or circulates an untrue statement in reference to another which is adapted to bring such person into contempt or to degrade him in public opinion or endanger his credit is punished for defamatory insult with imprisonment up to two years, and if the defamation is committed publicly or by circulating writings, pictures, or representations, with imprisonment for not less than one month.

If extenuating circumstances exist, the punishment may be abated to one day's imprisonment or a fine up to 900 marks may be imposed.

[4] Fuld, op. cit., p. 333; Finger, op. cit., pp. 207, 209, 222.

The assertion "you are being overcharged by your supplier," in a circular addressed to customers and intended to recommend one's own goods, has been held to be a statement of fact which is of a nature to injure a competing business within the meaning of this section. In the case in which this view was expressed, as in other cases the court stated that it is not material to consider in what sense a statement of fact is made, but only in what sense it is accepted by the business circles to which it is addressed.[1]

Examples of assertions that have been judged in violation of section 15 are (1) that two concerns were identical, when it was known that they were not; (2) that a firm had been dissolved, when the communicant had simply withdrawn from the firm.[2]

An interpretation of section 15 was made by the Imperial Court in 1910. The defendant told the customer of a competitor repeatedly, and with the knowledge that it was contrary to the truth, that the competitor would not come to the place in which the customer lived that year. Suit was brought by the competitor under section 15. The defendant entered the plea that the statement which he had made was not a disparaging statement and therefore was not a violation of this section. The court, however, held that the section was applicable to all statements, whether disparaging or otherwise, which were wilfully made or circulated and were calculated to injure another's business. Such statements, for example, as "a factory is burned," "a proprietor, on account of sickness, is not in a position to make deliveries," "a concern has discontinued the manufacture of certain goods or has ceased canvassing in a certain territory," contain nothing disparaging, but, nevertheless, are well adapted to injure the business and therefore, if untrue, fall under sections 14 or 15.[3]

Misappropriation of designations.—Section 16 of the law of 1909 is an enlargement of section 8 of the old law. It is directed against the unauthorized use of personal names, firm names, business designations, titles of works, etc. Such acts afford ground for an injunction and the recovery of damages.

Personal names are also protected against usurpation by section 12 [4] of the Civil Code and firm names by section 37 [5] of the Commercial

[1] Gewerblicher Rechtsschutz und Urheberrecht, 1911, S. 69.

[2] Fuld, op. cit., p. 380.

[3] Reichsgericht, Urt. v. 28. November 1910; cited by Seelow, op. cit., p. 111.

[4] Section 12 of the Civil Code, which protects personal names, reads as follows:

"If the right to the use of a name by a person entitled to it is disputed by another, or if the interest of the one so entitled is injured by reason of the fact that another uses the same name without authority, the person entitled may demand a discontinuance of the injury from the other. If further injuries are feared, he can bring an action to restrain."

[5] Section 37 of the Commercial Code, relative to firm names, reads as follows:

"Whoever uses a firm name not belonging to him according to the provisions of this chapter (third chapter—business firms) is to be required by the registry court to cease the use of the firm name under penalty of fines. The size of the penalty is fixed by section 14, second sentence.

"Whoever is injured in his rights by reason of the fact that another uses a firm name without authority may demand of the latter a discontinuance of the use of the firm name. An action to recover damages based on other provisions is not prejudiced."

Code. These provisions, however, were considered inadequate when the first law against unfair competition was enacted in 1896. Trademarks are protected against infringement or imitation by the trademark law of 1894, referred to above (see p. 621), and are not included in section 16 of the law of 1909. Sections 14 and 16 of the trademark law also prohibit the unauthorized use of personal names and firm names, decorations, and designations of provenance, in so far as they are affixed to or relate to goods.

Section 16 of the law of 1909 relates not only to the usurpation of personal names and firm names, but also affords protection to all special designations of establishments, such as business nicknames or fancy names.

The language of section 16 is as follows:

SEC. 16. Whoever in business dealings uses a name of a person, a firm name, or the special designation of a business establishment, of an industrial undertaking, or of printed matter in a manner which is adapted to produce confusion with the name, firm name, or special designation which another properly uses, may be made subject by the latter to an action to desist from such use.

The user is bound to compensate the injured party for damages if he knew, or ought to know, that the improper kind of use was adapted to produce confusion.

Equivalent to the special designation of a business establishment are such business insignia and other distinctive fittings for distinguishing the establishment from other establishments which are used within the business circles affected as marks of distinction of a business establishment. For the protection of trademarks and the dress of goods (secs. 1 and 15 of the law for the protection of trade-marks of May 12, 1894, Imperial Gazette, p. 441) these provisions have no application.

The provisions of section 13, paragraph 3, have corresponding application.

The expression "name of a person" (Name), used in section 16, includes the names of natural persons, juristic persons, and assumed names, but excludes the names of places and things. If personal names or designations have become generic, they are also excluded. The expression "firm name" (Firma), as defined by the Commercial Code, section 17, is the name under which a merchant conducts his business and which he uses as his business signature.

The expression "particular designation" (besondere Bezeichnung) includes any kind of a special business designation, such as a fancy name or pictorial presentation which serves to mark or distinguish a business establishment or undertaking. It also includes the title of any printed matter, such as a book, newspaper, periodical, photograph, musical composition, etc.

The third paragraph adds to the designations specified in paragraph 1 business insignia and other fittings which are used to distinguish one establishment from another. The term "business insignia" (Geschäftsabzeichen) includes, among other things, the shape and decoration of a business wagon, the decoration of a show win-

dow, the form of a business-name plate or sign, the form of emblems, etc. The term "fittings" (Einrichtungen) includes special forms of furniture, such as the tables of a restaurant, as well as the distinctive manner or form in which the letters, circulars, price lists, and other printed matter of a business establishment are gotten up.

Only those designations which have a distinctive character are protected. The same designation may possess this character in one case and lack it in another, so that each case must be decided according to the circumstances. Fuld states that German jurisprudence has not made as clear a distinction between designations that are distinctive and those that are not as has French jurisprudence.[1]

The principal classes of designations excluded by German jurisprudence as not being distinctive are (1) generic names, such as "patent bureau," "music school," "hotel," "café," etc.; also family names that have become generic, such as "Liebig," used in the designation "Liebig's beef extract"; (2) names of places, countries, rivers, mountains, etc., if not joined with another word; (3) figurative designations that have lost their distinctive character; (4) designations which are neither characteristic nor original.[2]

In determining whether the use of a firm name similar to that of some other firm is likely to cause confusion the courts consider, not whether confusion would exist where special care is exercised but whether confusion is likely to be created among buyers who use ordinary care. Due consideration is given to the fact that the average customer, and especially a new customer, frequently does not have in mind the designations of different concerns in the exact form in which they are entered in the trade register, but only such general impressions as are casually obtained. In a case involving this point the court held that if the general impression conveyed by the designations of two firms is the same the possibility of confusion exists and section 16 is regarded as applicable.[3]

Instances of designations which have been held to be of a nature to cause confusion are:[4]

Johann Maria Farina gegenüber dem Jülichplatz with Johann Maria Farina gegenüber dem Rudolfsplatz.

Gastwirtschaft zum Storch with Gastwirtschaft zum alten Storch.

Michels u. Co. with August Michels u. Co.

Weinstube zu den drei Kronen with Weinstube zum goldenen Kronengebäck.

Schiller Theater with Friedrich-Wilhelm Schiller Theater.

[1] Fuld, op. cit., pp. 414, 441.

[2] Fuld, op. cit., pp. 416, 417.

[3] Oberlandesgericht Frankfurt a/M, Urt. v. 11. Mai 1910; Gewerblicher Rechtsschutz und Wettbewerb, 1911, S. 69.

[4] Fuld, op. cit., pp. 439, 440.

In one case a Dresden concern known as the American Steam Laundry W. von Biela brought suit under the corresponding section of the earlier law against another laundry known as Schreibers amerikanische Dampfwäscherei und Kunstplätterei, because the latter at one of its offices had placed a small sign beside its German firm name bearing the words "American steam laundry." The court sustained the plea of the defendant that the small sign was put up, not for the purpose of producing confusion, but only because many Englishmen and Americans resided in that part of the city.[1]

A book entitled "Best Jokes from the Munich Fliegende Blätter" was brought out by a Leipzig publisher in 1910. The jokes, mostly anonymous, were taken largely from contributions to this paper during the years 1843 to 1873. The Fliegende Blätter brought suit for infringement of its rights and obtained judgment against defendant in both the State Court of Leipzig and, on appeal, in the Superior Court of Dresden. The higher court held that the use of the name of this widely read, humorous weekly in the title of the book published by defendant would cause the reading public to believe that it was published by the owners of the weekly.[2]

Unauthorized disclosure of trade secrets.—Four sections of the law of 1909—sections 17 to 20, inclusive—relate to the practice of divulging trade secrets. Section 17 corresponds exactly with the first two paragraphs of section 9 of the earlier law, which made it a penal offense, punishable with fine and imprisonment, for an employee to disclose a business secret to another for the purpose of competition. Section 18 is a new provision which prohibits with like penalties the selling or communicating for the purpose of competition of drawings, models, patterns, and other plans of a technical character. It is especially applicable to the embroidery and lace industries. Section 19 provides for compensation to the injured party in case of the violation of sections 17 and 18, and section 20 makes it a penal offense for a person to induce another to violate sections 17 and 18 for the purpose of competition.

The language of these four sections is as follows:

SEC. 17. Whoever as employee, laborer, or apprentice, of a business establishment, for the purpose of competition or with the intention to do injury to the owner of the business establishment, imparts to others without authority commercial or manufacturing secrets, which are confided to him on account of his employment or otherwise have become accessible to him during the period of employment, is punished with imprisonment up to one year and with a fine up to 5,000 marks, or with one of these penalties.

Like penalties affect him who, without authority, for the purpose of competition, makes a profit from or imparts to another commercial or manufacturing secrets, the knowledge of which he acquired through one of the means of com-

[1] Urt. v. 5. Jan. 1900; Seufferts Archiv., N. F., 25, S. 296.

[2] Oberlandesgericht Dresden, Urt. v. 3. Feb. 1911; Gewerblicher Rechtsschutz und Urheberrecht, 1911, S. 177.

munication specified in paragraph 1, or through his own act, contrary to law or in a manner repugnant to good morals.

SEC. 18. Whoever without authority, for the purpose of competition, makes a profit from or imparts to another plans or rules of a technical character, especially drawings, models, patterns, dress patterns, or recipes, which are confided to him in business dealings, is punished with imprisonment up to one year and with a fine up to 5,000 marks, or with one of these penalties.

SEC. 19. Acts contrary to the provisions of sections 17 and 18 obligate furthermore compensation for the injury arising therefrom. Several obligors are responsible as joint debtors.

SEC. 20. Whoever, for the purpose of competition, undertakes to induce another to do an act contrary to the provisions of section 17, paragraph 1, and section 18 is punished with imprisonment up to nine months and with a fine up to 2,000 marks, or with one of these penalties.

Two classes of business secrets are specified by section 17: (1) Commercial secrets and (2) factory secrets. What constitutes a secret is not defined by the law, but is left to the courts for determination. The Superior Court of Dresden has defined the term as "facts peculiar to a business management or a business undertaking and unknown to a third party, which, in the interest of the proprietor and of the business, are to be kept secret by the employees therein and which can not be made public to others without breach of faith."[1]

Examples of what the German courts have held to be factory secrets are: (1) Process for preparing cement, (2) method for preparing leather polish, (3) method for making cloth waterproof, (4) process for making bottles, (5) models for parts of watches or for shoes and slippers.[2]

Examples of commercial secrets are (1) business addresses, names of customers on bills of lading or price quotations; (2) formula book of an apothecary; (3) conditions of a tender; (4) drawings, plans; and (5) policies of an insurance company.[3] It has been held that it constitutes a business secret if the owner of a business intends to put a new line of goods unexpectedly on the market at a certain time.[4]

Three classes of persons are specified in the first paragraph of section 17 as being capable of violating its provisions—employees, laborers, and apprentices. Agents are not included. The second paragraph of this section, however, is not restricted to these three classes. It is intended, also, to reach ex-employees and others who profit from or reveal business secrets for the purpose of competition.

The expression used in paragraph 1, "confided to him * * * or have become accessible to him," covers every means of acquiring knowledge of secrets whether intentional or accidental, whether acquired within the confines of an establishment or outside. Discoveries and inventions by employees in connection with their regular duties are secrets which belong to the proprietor.

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[1] Fuld, op. cit., pp. 459, 460.
[2] Finger, op. cit., p. 340.
[3] Finger, op. cit., pp. 341, 342.
[4] Das Recht, 1914, Beilage No. 456.

The disclosure of a secret must be intentional in order to constitute a violation of this section. The employee must know that he has no authority to make the revelation. Paragraph 1 of section 17 specifies that the divulging of secrets must be either for the purpose of competition or with the intention of causing injury to the proprietor. The second paragraph specifies only the former motive. The obligation to maintain secrecy imposed by the first paragraph ceases with the termination of one's employment. It may, however, be continued beyond this point by agreement, providing the agreement does not impair the freedom of contract. In the absence of such agreement an ex-employee would be free to make use of the information acquired during his employment, even for competitive purposes, against his former patron were it not for the second paragraph which reaches employees, ex-employees, and all other persons who reveal or utilize for their own profit business secrets if secured in a manner contrary to law or good morals.

In addition to the penalties which section 17 prescribes for violation of its provisions, a civil action to recover damages is provided by section 19. The following is a case prosecuted under section 17:

While employed as correspondent for a company the defendant entered into contractual relations with a former competing employer to return to his employ on a certain date. Prior to this date he was requested by a representative of the latter to procure copies of bids, etc., and it was shown that he furnished several copies of bids and other information of value to the competitor. Suit was brought under section 17, paragraph 1. The court held that these copies of bids were trade secrets and imposed a fine of 500 marks upon both the employee and the representative of the competing concern to whom he furnished the information.[1]

Section 18 prescribes the same penalties as the preceding section for one who, for the purpose of competition, profits by the unauthorized use of plans and rules of a technical kind or reveals them to another. These two expressions cover all manner of models and instructions used in the production of goods. The section specifies drawings, models, patterns, dress patterns, and formulas as being of this character. To constitute a violation of this provision the plans or rules must have been secured by being confided to the guilty party in the course of business and must be used by him without authority or intentionally revealed by him to another for competitive purposes. Section 18 does not relate to the acts of employees. This point was decided by the Imperial Court in a case in which an employee of an automobile concern came into possession of its formulas. The court held that the penal provision of section 18 was applicable only

[1] Landgericht Cöln, Urt. v. 30. Sept. 1912; Markenschutz und Wettbewerb, Bd. XII, S. 298.

to such persons as were not employees at the time when the plans or rules of a technical kind were intrusted to them.[1]

This section supplements the law of June 19, 1901, for the protection of designs. In accordance with section 19, civil action for damages is permissible in case of violation of section 18, in addition to the penalties provided.

A person to whom a manufacturer had intrusted some patterns for use in making embroidery utilized them for his own profit without authority. Action was brought for violation of section 18. The defendant claimed that the patterns were not intrusted to him in the sense required for the applicability of this provision, since by selling the embroidery in job lots the plaintiff had expressly declared to the business world, as it were, that he had given up the designs, and, therefore, there was no obligation on the part of the defendant to maintain secrecy. This plea was rejected, however, the Imperial Court declaring that the question of the protection of the design was wholly independent of the protection of the patterns which formed the bases of the designs, and that section 18 did not require that the patterns, etc., the unauthorized use of which it prohibited, should have the characteristics of a factory or trade secret, as argued by defendant.[2]

Section 20 makes it a penal offense for a person to undertake to induce another to violate the first paragraph of section 17 or section 18 for the purpose of competition. The penalty prescribed is imprisonment up to nine months and a fine not exceeding 2,000 marks, or either. By "undertake" is meant every attempt, written or spoken, directly or through a third party, to cause another to violate these provisions. In making the attempt the motive of competition either must exist through one's own acts or by assisting another. In a case involving the latter motive, decided by the Imperial Court in 1913, an employee of a glass factory, in order to secure more remunerative labor for himself, induced the manager to take up a new line of manufacture. He intended to gain his end by inducing employees of another glass factory where he had been formerly employed to secretly deliver to him some of the pieces of glassware to be used as models by his factory. Action was brought against him under section 20. The court overruled his plea that his act was not for the purpose of competition as required by this action, but for the purpose of increasing his own earnings, holding that by inducing his factory to take up the new line of manufacture he intended that it should carry on competition with the other factory, and also intended to assist it to carry on such competition. The Imperial Court further held that, according to this provision of the law, it was important only that the intention

[1] Reichsgericht, Urt. v. 12. Dezember 1911; cited by Seelow, op. cit., p. 125.
[2] Reichsgericht, Urt. v. 4. April 1911; cited by Seelow, op. cit., p. 126.

to commit an act of competition should exist. It was not necessary to consider whether it was a final purpose or a means to an end.[1]

Administrative provisions.—Section 2 provides that agricultural products, services, and interests are included within the scope of the law. Agricultural associations of various kinds are empowered by this provision to participate in civil actions.

Section 13 provides civil remedies for violation of the various provisions preceding it and designates the persons competent to bring suit. These remedies consist of actions to enjoin and to recover damages. Every person engaged in business and every association for the promotion of business interests, if enrolled in the register of unions in accordance with section 21 of the Civil Code,[2] can bring suit to enjoin or can be enjoined. Where the violations of these provisions are made by employees or agents the injunctions may be issued against their employers. For further reference to section 13 see page 625.

Section 21 provides that the right to bring injunction and damage suits under this law expires in six months from the date on which the person injured had knowledge of the injurious act and of the person committing it; and, further, that irrespective of this knowledge suit can not be brought after three years from the date of the commission of the injurious act. The short period allowed by this section is regarded by some writers as a serious weakness of the law.

According to section 22, criminal prosecution may be begun only upon complaint except for the violation of sections 6, 10, and 11, when the public prosecutor has the power and the duty to begin prosecutions. Where the violation of sections 4, 8, and 12 has occurred, not only the individual injured, but also every business man who makes or sells similar goods or any association for promoting trade interests capable of bringing civil suits as specified in the first paragraph of section 13 is competent to bring a complaint for a criminal prosecution. It is also permitted to withdraw such complaint. Acts which may be prosecuted criminally on private complaint may also be prosecuted in private suit by the parties entitled to make such complaint. A public prosecution takes place only when it is in the interest of the public.

Section 23 provides that where a penalty has been imposed under sections 4, 6, 8, and 12 the cost of making public the judgment may be assessed upon the guilty party. A similar provision is made for violation of section 15, and also in cases where injunctions are issued. On the request of a person acquitted the court may order the publication of the acquittal.

[1] Urt. v. 4. April 1913; Entscheidungen des Reichsgerichts in Strafsachen, Bd. 47, S. 128.

[2] Section 21, Civil Code, states that an association whose object is not the carrying on of a business enterprise acquires juristic personality by registration in the register of associations of the competent district court.

Section 24 relates to the jurisdiction of the courts. It provides that action must be brought in the court in whose district the defendant has his place of business, or, in the absence thereof, his domicile. In the absence of both, it must be brought in the court of the place of his sojourn, or, if this is not known, in the court of the district in which the act occurred.

Section 25 provides for temporary orders in certain cases and specifies the courts which may issue such provisional orders.

Section 26 provides that, in addition to the penalties provided by the law, the injured party may demand the payment of compensation not in excess of 10,000 marks. This remedy excludes a civil action to recover damages. Thus the injured party is required to elect which remedy he will pursue.

Section 27 provides that civil actions brought before the State courts (Landesgerichte) should be tried by the commercial chambers of these courts.

Section 28 relates to the rights of foreigners under the law. A person whose principal establishment is not in Germany can invoke the protection of this law only when by an announcement in the Imperial Gazette it is established that German business men enjoy a corresponding protection in the State in which his principal establishment is located. This section has been superseded by section 10bis of the Washington Convention of the International Union for the Protection of Industrial Property, in so far as the signatories of this agreement are concerned. (See p. 698.)

Section 29 provides that the central authority of the Confederated States shall determine what authorities shall be considered as constituting the superior administrative authority within the sense of the law.[1]

GENERAL PROVISIONS.

Until 1900 there was no general provision of law in Germany under which objectionable methods of competition were actionable. Although, as stated above (see p. 620), provisions of law similar to article 1382 of the Civil Code of France existed in Prussia and other German States for many years prior to 1900, they were not applied to cases of unfair competition.

During the debate on the special law of 1896 against unfair competition the question of enacting a general clause applicable to all acts not covered by the special provisions was much discussed. The plan was opposed by the Government and finally defeated. According to a leading authority,[2] the meaning of the term "unfair competition" was not clearly understood at that time and a feeling of distrust

[1] Cf. Kahn und Weiss, op. cit., p. 386.

[2] Lobe, Die Bekämpfung des unlauteren Wettbewerbs, Bd. I, S. 128.

prevailed as to the ability of the courts to judge business relations correctly. Consequently, there was opposition to giving them too much freedom of interpretation through the enactment of general and flexible provisions.

The special law of 1896 against unfair competition only prohibited certain specified practices, thus supplementing the provisions of the Penal Code and the special laws for the protection of patent rights and trade-marks. The new Commercial Code of 1897 contained several additional provisions protecting family and firm names against misappropriation. Other unfair practices not specifically covered by the above laws could not be reached by the courts until the new Civil Code became effective on January 1, 1900. Sections 823 and 826 of this code contained provisions of law which were broad enough to permit suit to be brought in many cases that were not covered by the earlier legislation against specific evils. The language of these sections is in part as follows:

SEC. 823. Whoever, contrary to law, wilfully or negligently injures the life, body, health, freedom, property, or any other right of another is bound to such other for compensation of the injury arising therefrom.

SEC. 826. Whoever, in a manner repugnant to good morals, wilfully inflicts an injury upon another is bound to such other for compensation of the injury.

The application of these sections to cases of unfair competition met with opposition, but was finally affirmed by a decision of the Imperial Court rendered April 11, 1904, which laid down the principle that the gaps which the special law contained were filled by the Civil Code, especially section 826.[1]

At the time of the passage of the law of 1909 the necessity of adding a general clause was much discussed in view of the applicability of section 826 of the Civil Code to cases of unfair competition. According to Finger, the general clause was finally adopted because section 826 was considered too unwieldy in that it required the proof of intent and provided for an injunction only in the case of already existing injury.[2] The language of this section is as follows:

SEC. 1. Whoever in business affairs, for the purpose of competition, commits acts which are repugnant to good morals may be subject to an action to desist therefrom and to pay damages.

The term "business affairs" (geschäftlicher Verkehr), found in section 1, is very broad, embracing practically every industrial or commercial activity. By a liberal interpretation, artistic, scientific, legal, and medical activities may also be included where conducted for profit.

The expression "repugnant to good morals" (gegen die guten Sitten) is the same as that found in section 826 of the Civil Code.

[1] Fuld, op. cit., pp. 10, 11. [2] Finger, op. cit., p. 14.

The courts have defined good morals as that which is founded in the moral consciousness of the public, and is in harmony with the ideas of proper conduct held by all honest and upright-thinking people.[1] An absolute rule for determining what constitutes an act repugnant to good morals does not and can not exist. Many acts are not "immoral" in one case while clearly so in another. Consequently the question always is not whether an act of itself is contrary to good morals, but whether, as an act of competition, it is so considered.

The important differences between sections 1 and 826 are as follows: (1) Section 1 relates only to unfair competitive acts in business, while section 826 relates to all acts repugnant to good morals; (2) section 1 does not require the proof of wrongful intent, which is required by section 826; and (3) section 1 provides for both an injunction and the recovery of damages, while section 826 provides only for the latter. In the application of section 826, however, the courts have applied injunctive relief.[2] Furthermore, in the case of section 1, an injunction can be had if only ground for apprehension exists, while, as stated above, an action can not be brought under section 826 until the injurious act has actually begun. Section 826 of the Civil Code has one important advantage over section 1 of the new law against unfair competition. The statute of limitations does not apply to cases brought under the former until the expiration of three years, whereas in accordance with section 21 of the law of 1909 the statute of limitations applies to cases brought under section 1 at the expiration of six months after the injured party has knowledge thereof.[3]

The adoption of section 1 of the new law does not exclude sections 823 and 826 of the Civil Code from application to cases of unfair competition. This has been affirmed by the courts on several occasions.[4] As a result there are three general provisions available for all cases to which the special provisions of law do not apply. They may, however, be used conjointly with the special provisions.

An examination of the principal court decisions shows that section 1 of the law of 1909 and section 826 of the Civil Code, either separately or conjointly, have been applied to a variety of cases which are not covered by special provisions of law. Among these are the cutting of fixed resale prices, enticing customers, etc. These two provisions have also been applied frequently in conjunction with various provisions of the trade-mark law and the law against unfair competition to cases of confusion, fraudulent advertising, disparagement, etc. All such unfair acts, although covered by special pro-

[1] Fuld, op. cit., p. 48; Finger, op. cit., p. 20.
[2] Fuld, op. cit., pp. 24–26, 49.
[3] Allfeld, op. cit., pp. 161, 162; Das Recht, 1914, Beilage No. 767.
[4] Entscheidungen des Reichsgerichts in Zivilsachen, Bd. 74, S. 434; Bd. 79, S. 326; Das Recht, Beilage No. 767.

visions, are, apparently, regarded by the courts as repugnant to good morals and, therefore, in contravention of these two general sections.

Section 826 appears to be little used now except in conjunction with section 1 of the new law in the prosecution of unfair practices in business, since the latter offers the advantages noted above. Section 826, however, has been frequently applied to strikes, lockouts, boycotts, black lists, etc. Since the passage of the law of 1909 section 823 has also been little used alone in the prosecution of unfair competitive practices. It is occasionally found used in conjunction with one or both of the other general provisions. Following are some of the trade practices to which these general provisions against unfair competition have been applied.

CUTTING FIXED RESALE PRICES.—The act of selling below the price fixed by the manufacturer for resale is not of itself considered to be unfair competition in Germany. Recent decisions of the courts have definitely affirmed this view. Prior decisions were not clear on this point, for the reason that in the cases prosecuted the act of cutting prices was usually accompanied by other acts of a fraudulent or injurious nature which constituted unfair competition.[1] In opposition to the position taken by the courts it has been argued that the cutting of fixed resale prices of itself should be considered unfair competition, since by so doing dealers convey the impression to consumers that their competitors who maintain prices are selling too dear.[2]

Contracts by which producers bind the persons to whom they sell not to resell at less than a fixed minimum price are considered legal in Germany, and the breach of such contracts constitutes an act of unfair competition, which affords a ground for an injunction and the recovery of damages under section 1 of the law of 1909 and section 826 of the Civil Code. Such contracts, however, are not binding upon third parties.

Whenever unfair means are used in procuring goods to sell below the price fixed by the producer or supplier, the courts consider the act of selling such goods or of offering them for sale below the fixed resale prices repugnant to good morals, even when there is no breach of contract involved.[3]

The following cases will illustrate these principles:

A dealer sold some cigarettes below the price fixed by the Austrian Government monopoly. Suit was brought for damages under section 1 of the law of 1909. The court held that the sale of an article of commerce, such as the cigarettes in question, below the fixed price

[1] Gewerblicher Rechtsschutz und Urheberrecht, April, 1914, S. 111.
[2] Ibid.
[3] For a list of cases involving such practices, see Markenschutz und Wettbewerb, Bd. XIII, S. 592.

need not in itself be repugnant to good morals, but may become so if particular circumstances accompany it which are recognized as unlawful. In this case the defendant had bound himself to maintain the fixed price. It was only on this condition that the goods were delivered to him. Therefore, by breaking his contract, he committed an immoral (unsittlich) act, making him liable for damages.[1]

A retailer who was not bound by contract sold some goods below the resale price fixed by the factory. The factory brought suit under section 1 of the law of 1909 and section 826 of the Civil Code on the ground that the defendant was cognizant that all the customers of the factory were bound not to sell below a fixed price. The court rejected this view and held that a factory could not prohibit a third party with whom it had no contract from selling its products at a lower price than the minimum which it had fixed, for the goods might have been secured from some middleman who was not bound by the party that bought the goods from the factory, or the goods might have been purchased at a bankrupt sale.[2] The court said in part:

In any case we can not agree with plaintiff that an act repugnant to good morals is involved merely in the reselling of the goods for less than the price imposed by the plaintiff upon his customers. The defendant has the right to sell the goods, which he has procured in an honest way, at any price satisfactory to him. If he is to act in a manner contrary to good morals, an element of unfairness must be involved, such as causing the party from whom the goods were purchased to break his contract with the plaintiff. In the absence of such an element, such agreements between manufacturers and wholesalers would, from the standpoint of the plaintiff, have, so to speak, a material effect, and a shackling of business would result which would be altogether unendurable, and which in certain cases might itself even be considered as repugnant to good morals.

Plaintiff, who had secured the exclusive agency in Germany for the sale of the products of the Austrian Government tobacco monopoly, obligated all purchasers not only to maintain the established prices, but also to bind, in turn, every subdealer to do the same. A retailer, who purchased from the vendee of plaintiff, advertised and sold some cigarettes of this make at less than the minimum price. The court enjoined him from advertising or selling these cigarettes below the fixed price, unless obtained from a sheriff's sale, on the ground that under the conditions of sale imposed he could only procure the goods in an unusual manner which was repugnant to good morals in violation of section 1.[3] The court, however, declined to accept the view that price cutting itself constituted unfair competi-

[1] Beschluss des Kammergerichts v. 22. November, 1913; Gewerblicher Rechtsschutz und Urheberrecht, 1914, S. 198.

[2] Hamburg, Urt. v. 26. Juni 1914; Das Recht, 1914, Beilage No. 2445.

[3] Oberlandesgericht Jena, Urt. v. 4. Mai 1913; Gewerblicher Rechtsschutz und Urheberrecht, 1914, S. 89, 90, 91.

tion, but supported the position taken previously by other courts. On this matter the court said, in part:

Many find an act repugnant to good morals even in the fact that the dealer who sells such an article below the customary current price creates the misleading appearance that on all his goods he offers more advantageous prices than other dealers, and, on the other hand, makes it appear as if the other dealers (who faithfully keep their agreements to maintain the prices fixed by the supplier) were charging extraordinarily high prices. Those who hold this view see an act repugnant to good morals in the deception caused thereby. From this standpoint they deem it illogical, and also immaterial, whether the party that sells more cheaply procured the goods through his own or some middleman's breach of contract, * * * or, without such, perchance from a bankrupt sale.

But the court can not go that far. It rather supports the current view of the courts that the immoral factor of such an act of competition is to be found in the circumstance that the party that sells cheaper not only takes advantage of the circumstance that his competitors are bound by contract, but does this knowing that only a breach of contract enables him to underbid other dealers who abide by their contracts, no matter whether he himself breaks the contractual obligation resting upon him or some middleman does this by not in turn binding his customer to comply with the price agreement. For such profiting from a breach of contract by others, in order thereby to drive out of the field competitors who can not lower their prices unless they also are willing to break their agreement, is, according to the views of all reasonable and fair merchants, contrary to business propriety, and therefore repugnant to good morals. The interpretation of the court leaves, of course, the possibility open that branded articles (Markenartikel) may be sold below the fixed resale price without being repugnant to good morals if the resale, which took place without imposing an obligation to maintain the price, presented no breach of contract. This is the case if the goods are sold at a forced sale or from a bankrupt stock.

In another case of the same kind the defendant, in selling cigarettes at a discount, removed the identifying number, so that it was impossible for the exclusive agent to ascertain which middleman was breaking his contract by not binding subdealers. The court held that the defendant had committed an act repugnant to good morals by wilfully abetting the breach of contract of his suppliers, by buying at various times from them the cigarettes of the plaintiff sold in violation of the agreement made with the plaintiff, by removing the identifying number in order to prevent anyone from finding out his source of supply, and by selling the goods at less than the fixed price. Such acts, the court held, were not in harmony with the rules of propriety observed by all just and reasonable men and were a violation of section 1.[1]

An association of manufacturers of pharmaceutical products sold its trade-marked or identified articles to middlemen only on condition that they should not resell to the public below a fixed minimum price, that they should impose this same condition upon all dealers and

[1] Oberlandesgericht Breslau, Beschluss v. 12. Dez. 1913; Gewerblicher Rechtsschutz und Urheberrecht, 1914, S. 123.

should not deliver goods to certain firms which the association blacklisted. A retail druggist in Danzig sold these articles below the established price. Suit was brought under section 1 of the law of 1909 by the manufacturers' association, and also by an association of retail druggists organized for the purpose of fighting unfair competitive methods. It was shown that the defendant was fully cognizant of the conditions which attached to these identified articles, that he had procured his supply by unfair means, especially by deception and by causing a breach of contract on the part of certain middlemen. In answer to these charges the defendant claimed that the prices fixed by the manufacturers' association were excessively high and that the means used to maintain these prices were unfair. The court enjoined the defendant from securing these articles by unfair means and permitted the manufacturers' association to publish the judgment in five different papers for a period not exceeding two months.[1]

COMPELLING PRICE MAINTENANCE BY BOYCOTT OR INTIMIDATION.—The boycott is the weapon most frequently used to compel price maintenance. Intimidation is also used for this purpose. Both acts may be prosecuted as unfair competition under the general provisions. The following cases illustrate its application:

A book dealers' cartel sought to maintain the prices fixed by the publishers by binding its members not to give rebates. To compel nonmembers to maintain the fixed prices it entered into an agreement with a large number of publishers not to deliver to those dealers who were designated by the cartel committee as having cut prices, or to deliver to them only at a reduced discount. The cartel also issued a circular letter at stated intervals containing the names of dealers to be boycotted. A dealer who was thus discriminated against brought suit against the cartel on the ground that the boycott was repugnant to good morals in the sense of sections 823 and 826 of the Civil Code and the circulation of his name as a price cutter was a disparagement in the sense of section 824 of the Civil Code and section 6 of the law against unfair competition of 1896. The Imperial Court refused to accept this view of defendant's acts. It said, however, that if the plan adopted by the cartel had threatened the existence of plaintiff's business, to the extent of weakening or undermining it and of substantially injuring his credit or his standing in the business world, it would have been repugnant to good morals and contrary to section 826 of the Civil Code.[2]

An association of merchants in Dresden addressed a circular letter to the proprietors of certain concerns which gave special price reductions, announcing that it would publish the names of such proprietors and would expose the unfairness of this practice. In the newspapers

[1] Landgericht Danzig, Urt. v. 6. Juli 1911; Markenschutz und Wettbewerb, Bd. XI, S. 17.
[2] Urt. v. 14. Dez. 1902; Entscheidungen des Reichsgerichts in Civilsachen, Bd. 56, S. 271.

it stated that this practice was not permissible and was against good morals. An association representing those favoring the practice of giving special rebates brought suit against the defendant association under sections 1 and 14 of the law of 1909 against unfair competition. The lower court enjoined the defendants from publishing the names of the rebate-giving proprietors and from stating that this practice of giving rebates was unlawful, holding that such acts would be repugnant to good morals and a violation of section 1. Upon appeal the Imperial Court affirmed this view. It also stated that section 14 was not applicable in this case, because the plaintiff only under the general provisions. The following cases illustrate this form of unfair competition:

ENTICING CUSTOMERS.—This is another class of cases prosecuted only under the general provisions. The following cases illustrate this form of unfair competition:

Defendant's store was located across the street from the store of a competitor. On one occasion defendant's husband followed two persons who were going in the direction of the other store and induced them to visit defendant's store. On another occasion an employee of defendant distributed handbills to persons going to the plaintiff's store, which contained statements laudatory of defendant's business. Most of these handbills were distributed directly in front of plaintiff's show windows and entrance. The employee distributing them even advised persons not to patronize plaintiff, but to go to defendant's store, where they could buy more cheaply. Suit was brought under section 1 of the law of 1909. The court held that these acts exceeded permissible competition and enjoined defendant from such practices.[2]

The former agents of an insurance company sent a circular letter to the policyholders of this company advising them to cancel their policies and take out new policies with them. The policyholders were asked to forward the notices of cancellation to the former agents and were supplied with envelopes for this purpose. They were also advised that the former agents would call upon them personally for the purpose of taking out the new policies. Action was brought under section 1 of the law of 1909. The court held that it was repugnant to good morals for the defendants to thus solicit the policyholders of the plaintiff company to sever their business connections with it and to establish business connections with them; that defendants had attempted systematically to entice a whole group of customers, and, furthermore, by requesting the policyholders to mail them the notice

[1] Reichsgericht, Urt. v. 3. Mai 1912; Markenschutz und Wettbewerb, Bd. XII, S. 247.

[2] Kammergericht, Urt. v. 4. Februar 1911; Markenschutz und Wettbewerb, Bd. X (1911), S. 220.

of cancellation, had attempted to procure a weapon which they might use at an opportune time to bring pressure to bear upon the plaintiff.[1]

SUBSIDIZING A STRIKE AGAINST COMPETITORS.—The unlawful acts of strikers may be actionable under section 826 of the Civil Code. If the strike is instigated or subsidized by a competitor, it constitutes an act of unfair competition, which can be prosecuted either under section 826 of the Civil Code or section 1 of the law of 1909, or both. This practice is not covered by any of the special provisions. The following is a typical case (see also p. 262):

A goldbeaters' cartel induced a labor union, which was conducting a strike against two competing concerns not members of the cartel, to continue the strike for a year. The latter concerns brought suit against certain directing members of the cartel under section 826 of the Civil Code.[2] The Imperial Court said in part:

> If a business proprietor or a number of them wilfully induce a union of workmen, especially one of such size and influence as the German Metal Workers' Union, to forbid workmen belonging to the union to take employment with a certain employer, and if this happens for the purpose of making the operation of the latter's business impossible or difficult, and thereby eliminates competition, then this act of the proprietors concerned not only is repugnant to the principles by which persons of high mind and fine sense of propriety are guided in business, but it far exceeds that which according to the general public conscience and the moral conceptions of all reasonable and upright thinking persons is permissible in business competition.

COMPELLING EXCLUSIVE PATRONAGE.—To injure a competitor by threatening to discriminate against persons patronizing the latter, in order to compel exclusive patronage, is unfair competition.

A steamship company which operated from Hamburg, Bremen, and Antwerp to several Australian ports threatened a large shipper with higher rates than those given in its regular tariff if he continued to patronize a competing group of sailing vessels. The shipper brought action under section 826 of the Civil Code to enjoin the steamship company from discriminating against him. The Imperial Court granted relief, holding that the act of the defendant was repugnant to good morals.[3] The court said in part:

> According to the prevailing ideas of propriety and honesty in business the act of a shipping company which excludes an individual or even a certain group of individuals from the general tariff rates announced to the public is an infraction of good morals if it is done for the purpose of unfair competition.

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[1] Kammergericht, Urt. v. 3. Jan. 1912; Die Rechtsprechung der Oberlandesgerichte, Bd. 25 (1912), S. 341.

[2] Urt. v. 2. Feb. 1905; Entscheidungen des Reichsgerichts in Civilsachen, Bd. 60, S. 94, 104.

[3] Urt. v. 11. April 1901; Entscheidungen des Reichsgerichts in Civilsachen, Bd. 48, S. 114, 127.

DISLOYALTY OF FORMER EMPLOYEES.—The unfair acts of employees in accepting bribes for giving a competitive advantage to another or in revealing the secrets of commerce and industry, as already noted, are made penal offenses by section 12, second paragraph, and section 17, first paragraph, respectively of the law of 1909. The second paragraph of section 17 also makes it a penal offense for ex-employees to disclose or utilize trade secrets confided to them or obtained unfairly by them during their employment. Other unfair practices of ex-employees, however, may be ground for civil suits under the general provisions. A case of this kind follows:

A mechanical engineer while employed in a factory acquired knowledge of the construction of a machine. At the conclusion of his employment he made use of this information for his own profit, and also hired one of the employees of the factory to help him operate the machine. Suit was brought against him under section 826 of the Civil Code. The Imperial Court held that it was not repugnant to good morals for anyone to make use of the knowledge which he had acquired in the business of another, even if it was a secret of manufacture or trade, unless while employed he secretly and without the consent of his employer made drawings of the machine or committed some other act of similar nature. The court also held that it was not repugnant to good morals to hire the employee of the factory, since it was not shown that there was any breach of contract or other violation of contractual obligations. The court declared, however, that if it was established that the defendant from the beginning proceeded with the idea of competing against the plaintiff and, during his employment, through a violation of his contractual obligations, procured the data needed for this purpose, the decision would be justified that his whole course of action was contrary to good morals.[1]

DISPARAGEMENT.—Cases involving disparaging statements appear to be prosecuted more frequently under section 1 of the law of 1909 and section 826 of the Civil Code than under the special provisions of sections 14 and 15 of the law of 1909. A large number of cases of disparagement are prosecuted annually under these two general provisions. A few examples follow:

Defendant placed two large placards in his store, where they might easily be seen and read by every visitor, as follows:

No business can give away 5 per cent as a present. Trading stamps must always be paid for. A wise buyer, therefore, buys only where no trading stamps are given.

Suit was brought under section 1. The court held that this announcement of the defendant did not, as the defendant claimed, represent simply an opinion, which the one who reads it may or may not

[1] Reichsgericht, Urt. v. 29. März 1912; Markenschutz und Wettbewerb, Bd. XII, S. 404.

share. On the contrary, the defendant had made the positive statement of fact that every person who buys in a store that grants trading stamps must pay a higher price than he who buys in a store that does not grant trading stamps. The defendant was also aware that it was impossible to adduce proof of his claim. He had, nevertheless, made his statement, relying upon the gullibility of a part of the public, in order to discredit the trading-stamp stores by passing off a wholly vague statement as an established fact and in exploiting the gullibility of the public. By that means he attempted to draw to himself the customers of the trading-stamp stores. Such a method, amounting to a deception of the public, was held by the Imperial Court to be unfair and repugnant to good morals.[1]

A person who had obtained a court decision against a competitor for unfair competition published the decision as an advertisement in the newspapers during the Christmas shopping season, several months after the judgment was obtained. The advertisement was set in heavy type, a conspicuous title and a heavy black border, so that it would attract special attention. Suit was brought under section 1 and the court held that the unauthorized publication of the decision at the particular time and in the manner noted was contrary to good morals and therefore a violation of the section invoked.[2]

Defendant on two occasions published some disparaging statements regarding the product of a competitor. Suit was brought under sections 1 and 14 of the law of 1909 against unfair competition and section 826 of the Civil Code. It was shown that as the statements were true there was no violation of section 14. But the lower court held that under certain circumstances the circulation of true statements might be repugnant to good morals in the sense of section 1, and on this ground enjoined the defendant from publishing certain of the statements. Upon appeal the Imperial Court overruled this view, holding that the circulation of true statements for the purpose of competition was permissible, except under special circumstances, such as when the facts were no longer of interest to the public and such circumstances were not found in this case.[3]

Brewing interests in attacking the mineral-water manufacturers, who made besides so-called nonalcoholic drinks, published and distributed a pamphlet containing the following statements:

> And as for the so-called nonalcoholic drinks, very suspicious chemicals were found therein, in addition to an alcoholic content of as much as 2 per cent—that is, as much as in a light beer—and a customary quite insipid taste. Anilin, to give a very beautiful color, which is always the best in this "hell brew";

[1] Reichsgericht, Urt. v. 28. Oktober 1913; Das Recht, 1914, Beilage No. 268.
[2] Oberlandesgericht Kiel, Urt. v. 25. März 1913; Markenschutz und Wettbewerb, Bd. XIII, S. 328.
[3] Reichsgericht, Urt. v. 20. März 1914; Markenschutz und Wettbewerb, Bd. XIII, S. 489.

poisonous saponin, to produce the foam; impurities resulting from the use of impure water; and other unappetizing ingredients are not at all uncommon. That these "nonalcoholic" drinks usually cause very severe indigestion, everyone who uses them often will admit. * * *

The mineral-water manufacturers brought suit, under section 1 of the law of 1909 and section 826 of the Civil Code, to enjoin the publication of these statements on the ground that they were repugnant to good morals. The Imperial Court held that, while the acts of opposing groups, such as these, might contravene these sections, the particular statements circulated could not be regarded as against good morals, since the defendants, although pointing out definite faults, did not refer to particular drinks, but only carried on the fight against the opponents of alcohol in general.[1]

A certain almanac in the edition for 1910 contained an article which compared the value of Sunlight soap made in England with German grain soap, and stated in conclusion that the former was no better than the latter but was much dearer. Suit was brought by the English concern against the editor and publisher of this almanac, under section 1 of the law of 1909 and sections 823 and 826 of the Civil Code. The defendants were able to prove to the satisfaction of the Imperial Court that the statements contained in the article were true. The court therefore held that the above-mentioned sections were inapplicable.[2]

IMPLIED DISPARAGEMENT.—The disparagement of a competitor by implication may be unfair competition under certain circumstances.

A newspaper publisher printed for advertising purposes a time-table poster, containing also a list of the long-distance telephone subscribers for the district L, from which he intentionally omitted the name and telephone number of his competitor. The court held that the incomplete list, which was intended for use in public places, was of a nature to lead the public to believe that the plaintiff had no telephone connection. This would convey the impression that his business was only of limited importance or not up to date and result in an actual loss of trade. The act of omitting the name of plaintiff was therefore held to be repugnant to good morals in the sense of section 1 of the law of 1909.[3]

DECEPTIVE ADVERTISING.—Although this form of unfair competition is usually prosecuted under sections 3 and 4 of the law of 1909, such cases are sometimes brought under section 1. A few examples follow.

A dealer advertised in a Frankfurt a. O. paper that he would sell a coffee mixture at 78 pfennigs per pound. This mixture contained 54

[1] Reichsgericht, Urt. v. 7. Feb. 1913; Markenschutz und Wettbewerb, Bd. XII, S. 520.

[2] Reichsgericht, Urt. v. 26. November 1912; Markenschutz und Wettbewerb, Bd. XII, S. 337.

[3] Oberlandesgericht Hamm, Urt. v. 15. März 1912; Gewerblicher Rechtsschutz und Urheberrecht, 1912, S. 376.

per cent of pure coffee, the remainder consisting of a substitute. Suit was brought under section 1. The court held that in using the words "coffee mixture" and "superfine coffee mixture" the defendant had made an untruthful statement; that, taken in its entirety, the advertisement was of a nature to lead the public to believe that pure coffee was being offered to the public at a remarkably low price.[1]

As a result of the activities of British-American Tobacco Co. interests in Germany in acquiring control of cigarette manufacturers, the independent concerns adopted the policy of advertising themselves as "independent of a trust" (trustfrei). A cigarette concern in Dresden, a majority of whose stock had been secretly acquired by the trust in order to obtain the patronage of hostile dealers, advertised and proclaimed itself as independent. Suit was brought by an independent manufacturer for violation of sections 1 and 3 of the Law of 1909. The lower court enjoined the defendant from advertising itself in this manner, and upon appeal the decision was affirmed by the highest court.[2]

Creating confusion.—Cases involving confusion of products are usually brought under the various provisions of the trade-mark law (see p. 621); those involving confusion as to establishments under section 16 of the law of 1909. Frequently, however, confusion cases of both kinds are brought under the two general sections either alone or in conjunction with the special provisions. Numerous cases of this kind have dealt with the use of the designation "Pilsener" for beer not brewed in Pilsen. According to one writer, the Imperial Court in the beginning appears to have followed the view that such use of the designation "Pilsener" was contrary to section 16 of the law of 1909, but more recently it has, apparently, been inconsistent in its decisions, declaring, for instance, that the designation "Radeberger Pilsener" was permissible while "Engelhardt Pilsener" was not, that the designations "Hansaquell" and "Germania" Pilsener would mislead the public, while "Tinzer Pilsener" would not.[3]

A few cases involving confusion either in respect to products or establishments which have been brought under the general provisions follow.

A brewery in Bochum sold its beer under the designations "Schlegel-Pilsener" and "Deutsch-Pilsener." It also desired that its beer should be sold in the taverns as "Pilsener." Suit was brought by the breweries in Pilsen to enjoin the use of the designation "Pilsener" under section 1 of the law of 1909 and section 826 of the Civil Code. In keeping with former decisions, the court held that the use of such

[1] Oberlandesgericht Kiel, Urt. v. 15. Juni 1911; Gewerblicher Rechtsschutz und Urheberrecht, 1912, S. 73.

[2] Reichsgericht, Urt. v. 30. März 1915; Monatsschrift für Handelsrecht und Bankwesen, 1915, S. 126; also Kartell-Rundschau, 1915, p. 106.

[3] Markenschutz und Wettbewerb, Bd. XIII, S. 307.

words as "Pilsener" or "Münchner" for designating beers not brewed in Pilsen or Munich is permissible if by means of prefixes, especially those indicating definitely the location of the brewery, it is made clear, beyond a doubt, that these words designate only a quality and not the provenance of the beer.[1] But in this case, as shown by the selling of the beer in the taverns as "Pilsener," the defendant intended to deceive the public by establishing a confusion between his products and the "world-renowned" real Pilsener beer, which involved an act repugnant to good morals within the scope of section 826 of the Civil Code, and especially within the scope of section 1 of the Law against Unfair Competition.[2]

Some breweries in Berlin used the name "Engelhardt Berliner Pilsener" on their containers, price lists, etc. Suit was brought by the breweries in Pilsen to enjoin the use of this designation on the ground that it was a violation of section 16 of the trade-mark law, sections 1 and 3 of the law of 1909, and section 826 of the Civil Code, since it was a false statement of provenance made for the purpose of deception and was also repugnant to good morals. The lower court held that the suit was properly brought, but that the use of this designation was not a violation of these sections, since it did not refer to the provenance but to the manner in which the beer was brewed. Upon appeal the plaintiffs sought to prove that the beer was not brewed in the manner of Pilsener beer and that consequently the name was a false designation of process in the sense of section 3 of the law of 1909. The Imperial Court, however, ruled out this new evidence.[3]

A person having the name Adolf Hommel, jr., placed on the market a pharmaceutical product bearing his firm name and the name "Haematogen," in competition with a well-known product of the same name manufactured by the Hommel Haematogen Co. The latter brought suit against Adolf Hommel under sections 1, 13, and 16 of the law of 1909 and section 826 of the Civil Code. The lower court held that the words "Hommel" and "Haematogen" used by the defendant on his product created a confusion with the original product and, therefore, was a violation of section 16; also, that the act of wilfully creating confusion in this manner was repugnant to good morals and a violation of section 1. The Imperial Court affirmed the decision.[4]

Before the above decision was rendered the defendant dissolved the firm of Adolf Hommel, jr., and organized the company of Adolf

[1] See Entscheidungen des Reichsgerichts in Civilsachen, Bd. 79, S. 253.
[2] Reichsgericht, Urt. v. 28. Nov. 1913; Gewerblicher Rechtsschutz und Urheberrecht, 1914, p. 162.
[3] Reichsgericht, Urt. v. 15. April 1912; Markenschutz und Wettbewerb, Bd. XII, S. 515.
[4] Reichsgericht, Urt. v. 10. Juli 1913; Markenschutz und Wettbewerb, Bd. XIII, S. 66.

Hommel & Co. Another suit was then brought by the plaintiff under sections 1 and 16 of the law of 1909 to enjoin the new company from the use of the names "Hommel" in connection with "Haematogen." This the court did, and further ordered the dissolution of the new company and forbade the defendant to use the name "Hommel" in case another new company should be formed, on the ground that otherwise the same confusion would result. Upon appeal this decision was affirmed by the Imperial Court on the same date as the decision in the original suit. The court held that while the defendant had the right to use the word "Hommel" in business undertakings, that being his name, and even in the Haematogen business, he must not use it in such a way as to cause confusion with the business and products of a competitor.[1]

A manufacturer of spring mattresses registered a trade-mark which was an imitation of a competitor's design. Suit was brought to have the trade-mark canceled on the ground that its registration was against good morals. The Imperial Court held, in accordance with numerous decisions of the same nature, that the extinction of a trade-mark, although properly registered in conformity with the provisions of the trade-mark law, could be demanded on the basis of section 826 of the Civil Code, as well as section 1 of the law against unfair competition, if the effect of the registration was a breach of good morals.[2]

ARBITRATION BOARDS.—The most recent development in Germany regarding the suppression of unfair competition consists in having complaints of unfair competitive practices arbitrated and settled by a so-called board of arbitration (Einigungsamt), the members of which consist partly of business men.[3]

This new method of settling unfair competition cases, originated by practical business men, has proved so successful and has given such general satisfaction that it is being substituted for the regular court trials more and more throughout the Empire. It is argued in favor of this method that it does away with expensive and long litigation and the animosities, as well as the public disgrace, arising therefrom, and that it offers speedy relief instead of the cumbersome procedure and traditional rigid formality of ordinary court trials. In addition to arbitrating disputes the main functions of the board of arbitration are to exercise an educating and enlightening influence upon the business world regarding fair and lawful competition.

These new arbitration boards have proved to be especially useful in cases where the decisions of the Imperial Court, in conformity

[1] Reichsgericht, Urt. v. 10. Juli 1913; Markenschutz und Wettbewerb, Bd. XIII, S. 67.

[2] Reichsgericht, Urt. v. 16. Jan. 1913; Markenschutz und Wettbewerb, Bd. XII, S. 471.

[3] Berliner Jahrbuch für Handel und Industrie, Bericht der Ältesten der Kaufmannschaft von Berlin, 1912, Bd. I, S. 347, and 1913, Bd. I, S. 357.

with the letter of the law, were not broad enough and had not kept pace with the progress of current business methods and customs.

The first of these arbitration boards was organized October 8, 1910, by the Seniors of the Merchants of Berlin. Up to the close of 1911 it had acted in 20 sessions on 156 complaints, of which 106 were settled by arbitration. During the year 1913 the board received 82 complaints against 119 for the preceding year. In 40 cases an agreement was reached and in 16 other cases the claims were settled. This Berlin experiment rapidly found favor among business men and chambers of commerce throughout Germany, and within two years (1910–1912) similar boards were established in 16 German cities, among them Düsseldorf, Munich, Frankfurt a. M., Frankfurt a. O., Strassburg, etc.

Six other cities are planning to establish similar boards.

Regulations of the Berlin Board of Arbitration.—For the settlement of contests on account of unfair competition a board of arbitration (Einigungsamt) in matters of unfair competition is established by the Corporation of the Merchants of Berlin:[1]

ART. 1. The board of arbitration meets whenever its mediation is agreed upon by the parties in interest. In case only one party appeals to the board the chairman shall notify the other party, and shall at the same time make an effort, to the best of his ability, that the second party also agree to appeal to the board of arbitration.

ART. 2. The board of arbitration consists of the chairman and four associates.

The chairman is the syndic of the Corporation of the Merchants of Berlin; his substitute as chairman is the deputy syndic or a jurist who is eligible for a judgeship.

In each case the Seniors of the Merchants of Berlin and, in urgent cases, their presidents, shall appoint four business men as associate members; of these, if possible, two shall belong to the same branch of business as that in which the act of unfair competition is alleged to have been committed. The associate members, who shall belong to the branch of business in question, are to be selected primarily from the lists proposed by the branch association. In the same way four substitutes are appointed.

It is permissible to appoint as associate members also employees in a qualified position.

ART. 3. The plaintiff shall file the complaint, together with motivation and any proofs, if possible, in three copies, with the chairman of the arbitration board.

ART. 4. The proceedings before the board of arbitration shall be oral and secret. Associations for promoting business interests are entitled to be present; upon request they are also to be heard.

ART 5. The parties may be represented by business men or persons with a knowledge of law.

ART. 6. A record is to be kept concerning the proceedings before the board of arbitration. By being incorporated in the record, the results of the proceedings, especially agreements and decisions, are to be established.

[1] Berliner Jahrbuch für Handel und Industrie, Bericht der Ältesten der Kaufmannschaft von Berlin, 1910, Bd. I, S. 538.

ART. 7. If an agreement is not reached the board of arbitration may issue an award, provided the parties have signed the following written declaration:

"We agree that the arbitration of the legal contests existing between us relating to unfair competition shall be effected through the board of arbitration of the Corporation of the Merchants of Berlin in matters of unfair competition, which shall also decide as regards the costs of the trial; furthermore, that we shall be liable as joint debtors for the expenses of the board of arbitration—reserving any claims on our part for restitution; also, that the Royal Lower Court of central Berlin, or the Provincial Court I of Berlin, shall be considered the proper court for filing the decision."

ART. 8. No fees are collected for the trial by the board of arbitration. The chairman may demand a suitable advance for covering expenses.

Section 11. Austria.

INTRODUCTORY.—Unfair competitive practices in Austria are prosecuted under various provisions of the Penal Code and special laws. There appears to be no general provision of law applicable to such practices. The Civil Code contains in section 1295 a general provision similar to article 1382 of the French Civil Code, which reads as follows:

SEC. 1295. Every person is entitled to demand from the injurer compensation of the injury which the latter has done him as a result of a wrong; the injury may have been caused by a breach of a contract obligation or without any relation to a contract.

This section has not been utilized as a means of protection against unfair competition on account of the narrow interpretation given it by the courts. Austrian jurisprudence has always, in theory and practice, interpreted the term "wrong" (Verschulden) in this section in such a manner that to constitute liability for compensation it requires the breach of a contract obligation or the violation of an explicit provision of a law or of a legal decree.[1] The Administrative Court (Verwaltungsgerichtshof) declared it to be a generally established principle that "every kind of competition is permissible which does not conflict with the legally protected rights of others."[2]

Austria as yet has no comprehensive special law against unfair competition. In order to prepare such a law, the Austrian minister of commerce, in a decree of September 7, 1899 (Z. 47800), called upon the chambers of commerce and trade for their opinions and suggestions concerning certain kinds of unfair competition, and a bill was drafted in 1906.[3]

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[1] "Gutachten über die mit dem Erlasse des K. K. Handelsministeriums, 6. Okt. 1906, versendeten Gesetzentwürfe betreffend den Schutz gegen unlauteren Wettbewerb," Wien, 1906, S. 22.

[2] Erkenntnis v. 4. Okt. 1882, Z. 1513, Budwinski: Die Erkenntnisse d. K. K. Verwaltungsgerichtshofes, 1882, Nr. 1513, S. 443.

[3] Entwurf eines Gesetzes betreffend den Schutz gegen unlauteren Wettbewerb; No. 2596 der Beilage zu den stenograph. Protokollen des Abgeordnetenhauses, XVII. session, 1906. See also Leonhard, Der Unlautere Wettbewerb und seine Bekämpfung, 1903, S. 90 fol.

This bill contains civil-law provisions against fraudulent advertising, appropriating and misusing distinctive marks of others, and betrayal of business and trade secrets. Penalties of fine and imprisonment are provided where these acts are intentionally done.

The bill also makes obligatory the designation of certain goods with reference to their quantity, quality, or provenance.

A general provision in section 16 reads as follows:[1]

Every act committed in the course of conducting a business enterprise which is grossly repugnant to good morals and adapted to injure the sales or other business activity of one or more competitors is to be regarded as unfair competition.

PENAL CODE.—Section 197 of the Penal Code[2] is applicable to cases of injury to the property of another person, as, for instance, a run on a bank caused by subtle, false pretenses.[3] Section 308 is applicable to cases involving the circulation of disparaging statements regarding the credit or products of another. The language of this section is as follows:

SEC. 308. Whoever, in a public announcement (by means of wall posters, public speeches or lectures, etc.), disseminates or spreads a false rumor disturbing public safety, without sufficient reasons for considering it to be true, or an alleged prediction of like kind, is guilty of a misdemeanor, and is to be punished with close arrest of from eight days to three months.

This section was held to be applicable in a case where an Austrian Regie cigarette was artificially caused to explode in order to give rise to the rumor that cigarettes of a dangerous nature were to be found among the products of the Regie factories.[4]

TRADE LAW OF MARCH 15, 1883.—The so-called trade law of March 15, 1883,[5] amending the Industrial Code, contains several provisions relating to the misappropriation or misuse of various business designations. Of these, sections 46 and 49 are the most important. The language of these sections is as follows:

SEC. 46. No tradesman is entitled, for the exterior designation of his place of business or dwelling, whether in circulars, public announcements, or price lists, to unlawfully appropriate the name, firm name, coat of arms, or special designation of the establishment of some other domestic tradesman or producer, or to falsely designate in the above-named manner the products of his trade establishment as having come from another establishment.

Such an offense gives the injured party the right to call upon the proper trade authorities to stop the further use of the unlawful designation or to prohibit the false announcement.

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[1] Cf. Lobe, Die Bekämpfung des unlauteren Wettbewerbs, 1907, Bd. I, p. 108.

[2] Das Strafgesetz vom 27. Mai 1852, Reichsgesetzblatt, 1852, Nr. 117.

[3] Leonhard, op. cit., p. 49.

[4] Entscheid. des Obersten Gerichtshofes vom 12. Mai 1899, Z. 5298, Sg. 2353; cited in Löffler u. Lorenz, Das Strafgesetz vom 27. Mai 1852. Wien 1912, S. 523.

[5] "Gesetz vom 15. März, 1883, betreffend die Abänderung und Ergänzung der Gewerbeordnung," Reichsgesetzblatt, 1883, No. 39, S. 113.

The protection accorded the injured party is not precluded by the fact that, in addition to the unlawful designation or false declaration, the name, firm name, coat of arms, special designation of the establishment, or the mention of another trade establishment, are made with such additions, omissions, or other changes as are not discernible with ordinary attention.

SEC. 49. Furthermore, an offense is committed by—

1. Every tradesman, who in cases which have not already been covered by section 46 or by the law for the protection of trade-marks, for the exterior designation of his place of business or dwelling, for the designation of products, or generally in conducting his business and in affixing his signature, makes use of a name to which he is not entitled, unless authorized thereto by the prior recording of his firm name in the trade register.

2. Every tradesman who, in the cases mentioned under 1, appropriates to himself marks of distinction which have not been conferred upon him.

3. Every tradesman who, in the cases mentioned under 1, uses a designation which permits the inference of a partnership relation, whereas in reality none such exists.

4. Every tradesman who fails to use his full first name and surname, unless justified by the prior recording of his firm name in the trade register.

5. Every tradesman who, in the cases mentioned under 1, while a partnership relation exists, uses a designation which contains not only names of partners but, besides, an addition which suggests the existence of a partnership, without being authorized to use such a firm name in the sense of the Commercial Code.

In a decision of March 6, 1908, the Ministry of Commerce held that the use of the name "Grand Hotel Slavia," in the city of Turnau, constituted an infringement on the rights of an older establishment in the same town, known as "Grand Hotel," according to section 46 of the trade law, because the words "Grand Hotel" constitute an essential element of the older firm's name and because the addition, "Slavia," is not discernible with ordinary attention.[1]

A certain manufacturer, Eisner, used as a sign on his shop the words "Siegfried Eisner, to the busy Fischer," the word Fischer which was the name of a competitor who previously occupied the same shop, being in letters seven times as large as the other words on the sign. The Ministry of the Interior held that this act constituted a violation of section 46 of the trade law because the word "Fischer" would be taken to denominate the competitor.[2]

Judgment was given against a dealer who advertised his beer in the newspapers as being "according to the type of Pilsener beer," the words "according to the type of" being printed in small type, whereas the words "Pilsener beer" were in heavy type.[3]

A certain R. in Pilsen, who named his drug store "Drogerie zum goldenen Krebs," was found guilty, according to section 46 of the

[1] Entsch. d. Handelsministeriums v. 6. März 1908, Z. 2810; Öster. Patentblatt, 1908, p. 676.

[2] Entsch. d. Ministeriums d. Innern v. 5. Nov. 1902; Öster. Patentblatt, 1903, p. 225.

[3] Entsch. d. Statthalterei in Lemberg, v. 5. März 1912; Öster. Patentblatt, 1912, p. 701.

trade law, of infringing the trade rights of Richter & Co., owners of the "Drogerie zum roten Krebs." The Administrative Court held that the names "Zum roten Krebs" and "Zum goldenen Krebs" were likely to give rise to confusion, all the more in this case because the defendant was then conducting his business in the former shop of the plaintiff. The court said further that in considering the possibility of confusion between the names of two establishments it is not so important to consider their specific details as to weigh the impression caused by these details collectively, and also to consider local conditions.[1]

The trade law of 1883 was amended in 1902[2] by the addition of several new sections in place of sections 59 and 60. The second paragraph of the new section 59[2] contains the following provision which has been applied by the courts to the so-called block system:

> The soliciting of orders for goods of persons who do not have use for such goods in their business is unconditionally forbidden to proprietors or their representatives with respect to the sale of groceries and dry goods inside as well as outside of the place of business; with respect to other goods the soliciting of orders of the above-mentioned persons outside of the place of business is permitted only in special cases where an express written request naming specific goods has been directed to the proprietors.

The so-called "block system," which was much complained of by Austrian merchants as being an unfair method of trade development, was held by the Administrative Court to be repugnant to section 59 of the law of February 25, 1902. This system operates as follows: By presenting a stem coupon costing 1 krone 25 heller and 5 kronen additional the buyer receives a block consisting of four coupons, at 1 krone 25 heller each. The buyer is advised to pass on to other prospective buyers each of these coupons for 1 krone 25 heller, so that he receives back his 5 kronen. If a new block is bought under like conditions by the holders of each of the four coupons, the original buyer receives 20 kronen worth of goods, the value of which has been paid by the other four blocks. If all of the four blocks are not sold, the original buyer receives 5 kronen worth of goods for each block sold.[3]

A dry goods merchant of Chrudim appealed from an order of the Ministry of Commerce restraining him from making further use of the "block" system in his business. The appeal was dismissed partly on the following ground: The block system is unlawful and directly at variance with section 59 of the trade law of February 25, 1902, because the method employed in selling the "blocks" involves the use

[1] Erkenntnis d. Verwaltungsgerichtshofes v. 7. Mai 1913, Z. 4809; Öster. Patentblatt, 1914, p. 164.

[2] Gesetz vom 25. Febr. 1902; Reichsgesetzblatt, 1902, Nr. 49.

[3] Erkenntnis d. Verwaltungsgerichtshofes v. 7, Jänner 1909; Öster. Patentblatt, 1909, p. 1117.

of numerous auxiliary solicitors whose function is to drum up trade for the tradesman in various localities differing from, and without regard to, the location of his business. Section 59 permits orders for goods to be solicited only by persons who are officially licensed employees of the tradesman. Furthermore, orders shall be solicited from private persons only upon special written request to the tradesman with explicit mention of the goods desired.[1]

TRADE-MARK LAW.—The law of January 6, 1890,[2] relating to the protection of trade-marks, as amended July 30, 1895, contains a number of sections prohibiting the wrongful use of trade-marks.

Section 3 excludes from registration trade-marks which are currently used in commercial intercourse for designating certain kinds of goods, as well as those which contain immoral and offensive or other representations contrary to public order, or inscriptions or statements such as are contrary to actual business conditions or to truth, and which are calculated to deceive consumers.

Section 10 prohibits the misappropriation of various designations as follows:

SEC. 10. No person may, without permission from the interested party, make use of the name, firm name, coat of arms, or business name of the establishment of another producer or merchant for designating goods or products.

Sections 23 and 24 relate to the sale or offer for sale of goods bearing fraudulent trade-marks. The language of these sections is as follows:

SEC. 23. Whoever knowingly circulates or offers for sale goods which have been designated without authority with a trade-mark with respect to which the exclusive right of use belongs to another, or whoever knowingly counterfeits a trade-mark for this purpose, is guilty of an offense and is punished with a fine of from 500 to 2,000 florins, or with imprisonment of from three months to one year, to which may be added a fine not to exceed 2,000 florins.

The simultaneous application of the more severe provisions of the Penal Code, especially those relating to the crime of fraud (sec. 197 fol.) are not hereby excluded.

SEC. 24. The provisions of section 23 have application also to the one who knowingly circulates or offers for sale goods which have been designated without authority with the name, firm name, coat of arms, or business name of the establishment of a producer or merchant, also to whoever for this purpose knowingly makes such designations.

LAW REGULATING CLOSING-OUT SALES.—The law of January 16, 1895,[3] regulates the advertising and conduct of closing-out sales. Section 1 provides that such sales can only be held with the approval of the

[1] Josef Křenek ca. Handelsministerium, Erkenntnis v. 2. Okt. 1907, Z. 8911; Budwinski, op. cit., Bd. XXXI, S. 887, No. 5388.

[2] Gesetz vom 6. Jänner 1890, mit Ergänzung und Abänderung vom 30. Juli 1895; Reichsgesetzblatt, 1895, Nr. 19.

[3] Gesetz vom 16. Jänner 1895, betreffend die Regelung der Ausverkäufe; Reichsgesetzblatt, 1895, No. 26, S. 83.

trade authorities. The application for permission must, according to section 2, contain the following declarations:

1. Designation, according to quantity and quality, of the goods to be sold.
2. Exact statement of the place of the closing-out sale.
3. Period of time during which the closing-out sale shall take place.
4. The persons who own the goods or other chattels to be sold; also the persons who are to carry on the closing-out sale (for instance, the owner of the business, his employees, business manager, etc.).
5. The reasons why the closing-out sale is to take place, such as death of the owner, going out of business, taking over of the business by a new owner, removal of the business, unforeseen events of nature, etc.

Section 4 provides that the local trade authorities can not grant permits for a closing-out sale for a period longer than three months. The Provincial authorities, however, can extend this period in particular cases to one year.

A sale can not be begun until the permit is granted and can not extend beyond the period allowed. Furthermore, the sale must be limited to the goods originally advertised, otherwise it can be terminated immediately, the proprietor fined, and the unadvertised goods which have been added to the stock forfeited.

COPYRIGHT LAW.—The law of December 26, 1895,[1] regarding copyright on works of literature, art, and photography contains two provisions of interest. They are as follows:

SEC. 22. If there is given to a work without any inherent necessity the designation, especially the title or the outward appearance, of a work that has appeared earlier, and if this is adapted to deceive the public regarding the identity of the works, the author of the earlier work is entitled to claim compensation.

The same holds good if the designation or outward appearance of the work which appeared earlier was reproduced with such minor or indistinct changes that by close scrutiny only can the difference be noticed by the public.

If a continuous or periodic work is concerned, the interdiction of the further use of the misleading designation or outward appearance can be demanded of the criminal court.

SEC. 53. Whoever, with the intention of deceiving, provides another person's work with his own name, or one of his own works with some other person's name, in order to place it in circulation, or whoever knowingly places such a work in circulation, is guilty of an offense, even if there is no violation of a copyright, providing more stringent provisions of the Penal Code do not apply.

Whoever, with the same intention, makes a false application at the public copyright office is also guilty of this offense.

The penalty for this offense is a fine of from 100 florins to 2,000 florins or imprisonment from one to six months.

FOODSTUFFS LAW OF JANUARY 16, 1896.—The law of January 16, 1896,[2] which is intended primarily for the protection of the consumer against the adulteration and misbranding of goods, contains in sec-

[1] Gesetz vom 26. December 1895, betreffend das Urheberrecht an Werken der Literatur, Kunst und Photographie; Reichsgesetzblatt, 1895, No. 197.

[2] Gesetz vom 16. Jänner 1896, betreffend den Verkehr mit Lebensmitteln und einigen Gebrauchsgegenständen; Reichsgesetzblatt, 1897, No. 89, S. 437.

tion 11 some provisions prohibiting certain unfair practices that result in injury to competitors. The language of this section is as follows:

SEC. 11. He is guilty of an offense and is punishable by imprisonment from one week to three months, to which may be added a fine up to 500 florins, or by fine alone from 5 florins to 500 florins.

1. Who imitates or adulterates articles of food for purposes of deception in trade and commerce.

2. Who knowingly offers for sale in a form or under a designation adapted to deceive, articles of food which are imitated, adulterated, decayed, unripe, or have suffered in their nutritive value.

3. Who sells or offers for sale food products under a false designation for the purpose of deception.

4. Who knowingly sells articles of food which are imitated, adulterated, decayed, unripe, or have suffered in their nutritive value, unless the buyer knew or obviously should have known of this condition.

Section 12 provides penalties for the negligent violation of the prohibitions of section 11, as follows:

SEC. 12. Whoever negligently commits the acts designated in section 11, subsections 2 and 4, or negligently sells or offers for sale articles of food which have been provided with a false designation for purposes of deception is guilty of an offense and shall be punished by imprisonment of from 3 to 14 days, to which may be added a fine up to 100 florins, or by a fine alone of from 5 florins to 300 florins.

A number of instances of the application of section 11 to cases of unfair competition follow:

In the case of a wine merchant who sold Hungarian champagne in bottles labeled "Carte Blanche vin Sec. Bougemont et Cie., Reims," to dealers who knew from the low price that the wine was not French champagne, the court held that the purpose and possibility of deception, as well as the mere offer for sale of the falsely labeled wine, were sufficient to constitute a breach of section 11 of the pure-food law.[1]

Designating beer not brewed in Pilsen as "à la Pilsen" or "alla Pilsen" was held to be a breach of the pure-food law of January 16, 1896, it being unnecessary to show actual injury either to the health or to the purse of the purchaser.[2]

In a case where a brewer was fined for labeling his beer "Hannsdorfer Pils," the District Court of Olmütz, April 15, 1912, held that "the meaning of a word used for designating beer depends exclusively upon the views of the public that drinks beer. 'Pils' denotes a beer produced in Pilsen. Like 'Pilsen' it denotes provenance and is not a generic term. These words do not lose this meaning if combined with a second word denoting provenance,

[1] Entsch. d. Obersten Gerichtshofes. Urt. v. 19. Juli 1911; Öster. Patentblatt, 1912, p. 982.

[2] Urt. des Landesgerichtes Laibach v. 4. März 1912; Öster. Patentblatt, 1912, p. 696.

as 'Hannsdorfer Pilsner.' No addition whatever to the word 'Pils' can exclude the possibility of confusion arising out of its meaning as denoting provenance. Nor is the possibility of confusion excluded by the fact that the incorrectly designated beer is cheaper in price than Pilsner beer."[1]

Section 12. Hungary.

The Hungarian trade law of 1884[2] contains the following provisions applicable to unfair competition:

SEC. 58. No tradesman or merchant shall use upon his firm name, his stationery, or his advertisements such designations, marks, or data as do not correspond to the true business relations or to actual facts.

SEC. 157. * * * (d) Whoever uses upon his firm name, stationery, or advertisements such designations, marks, or data as do not correspond to the true business relations or to actual facts, is to be punished with fines of from 20 to 200 florins.

Section 13. Denmark.

PENAL CODE.—The Penal Code of Denmark[3] contains several sections relative to particular forms of unfair competition. Among these may be mentioned section 277, which prohibits the construction or use of false weighing and measuring apparatus, and section 278, which prohibits the adulteration of goods or the use of stamps or marks on goods for the purpose of deceiving the purchaser as to their quality.

SEC. 277. He who, with fraudulent intention, constructs incorrect measures or weighing apparatus or alters correct measures or weighing apparatus, as well as he who makes use of such false or falsified apparatus to deceive others therewith, is punished with imprisonment on water and bread not under five days or with correction-house work up to two years. Under specially aggravating circumstances, as also in case of repetition of the offense, the punishment may be increased up to six years of "hard labor."

He who in his occupation uses a weight or measure which is not lawfully tested, or which by time or use has become changed, is punished the first time with fines up to 100 Rd., and in case of repetition with higher fines or imprisonment.

SEC. 278. To the punishment prescribed in the first paragraph of the foregoing section is also liable he who adulterates goods or who falsely furnishes goods or other objects with an official stamp or mark that shall guarantee the genuineness or quality of the same, or who fraudulently appropriates for himself such stamp or seal on objects which are not suited thereto, as well as he who, without authority, places a mark or stamp of others on goods that are of considerably inferior quality than that which is indicated by the stamp or mark.

If the goods on which the mark or stamp of others is placed without authority are not of considerably inferior quality, the punishment prescribed in section

[1] Kreisgericht Olmütz, Urt. v. 15. April 1912; Öster. Patentblatt, 1912, p. 698.

[2] Gesetz-Artikel vom Jahre 1884, über das Gewerbegesetz; Landesgesetz-Sammlung für das Jahr 1884, p. 181 fol.

[3] Almindelig borgerlig Straffelov af 10. Februar. 1866.

277, second clause, is to be applied, and prosecution only takes place provided the one who is injured thereby demands it. The penal provision just mentioned becomes applicable also with respect to minor adulteration of goods occurring in the retail trade by which only an insignificant loss is inflicted on anyone.

UNFAIR COMPETITION LAW OF 1912.—Denmark has a special law regarding unfair competition[1] which, however, is not as complete as the German law of 1909. It is the only law in Europe, apparently, which expressly prohibits the giving of premiums, coupons, and trading stamps. The practices against which the law is directed and the provisions relating thereto are as follows:

Sections 1 to 5, inclusive, relate to the incorrect designation of goods sold or put on sale.

SEC. 1. Whoever sells or offers goods for sale must not have designations affixed to these, their labels or wrappers or by signboards or on billheads, invoices, or other business documents, which—

1. Either contain an incorrect statement with reference to the place (or country) of production of the goods, character, material, or method of manufacture, or are of such a character that they are calculated to give an erroneous impression in any of the named respects; or

2. Are calculated to give the buyer the impression that one and all of the various kinds of goods handled in the business originate in the same place (or country) of production or have the same methods of manufacture although this is the case only in part; or

3. Incorrectly state that the goods have received awards at expositions or have received recommendations from authorities or have obtained patent protection still in force.

Violations hereof are punishable with fines of from 50 to 2,000 kroner. The punishment may, however, under aggravating circumstances, namely, in case of frequent repetition of the offense, be increased up to simple imprisonment for six months.

Furthermore, the person convicted shall, if the incorrectly designated goods are still in his possession or in other ways are at his disposal, be obligated by the judgment to correct the incorrect designations, or if the goods are not manufactured in this country, then to export them from the country, if he so prefers.

SEC. 2. If the incorrect designations of the goods have been circulated by advertisements in the newspapers, by handbills or signboards of especially conspicuous nature, this shall be regarded as an aggravating circumstance.

SEC. 3. Designations that give an incorrect impression of the place of production (incorrect place name) of the goods do not come under the application of the penal clauses above mentioned when the designation in question following the usual interpretation or custom and usage in business indicates the nature of the goods and method of manufacture or the like and not the place of production.

Where public policy makes it desirable, however, a royal edict shall stipulate that certain designations are excepted from this regulation. Violation of such an edict is punished as provided in section 1.

Designations that consist of statements as to currency, measure, or weight are not considered as statements of the place of production of the goods. That

[1] Lov om Straf for Brug af urigtig Varebetegnelse, Nr. 137, 8 Juni, 1912.

the designations used are in the language of a country other than that in which the goods are manufactured or from which they are imported is not in itself regarded as an incorrect designation of goods, but the decision relative thereto depends on the external form and content of the designation.

A designation which by itself must be regarded as an incorrect statement of the place of production of the goods shall not be regarded as such when by a clear and valid additional statement information is given concerning the actual place of production of the goods.

SEC. 4. In this country it is forbidden to sell or offer for sale goods on which or on the labels or wrappers of which is placed the red cross on a white field described in the Geneva convention of July 6, 1906, of announcement No. 174, of July 24, 1907, as an emblem and badge for the army's sanitary service, formed by reversing the colors of the arms of the Swiss Confederacy, or the designations "Red Cross," "Geneva Cross," or marks of similar designation or description. Violation of this regulation is punishable by fines up to 100 kroner.

The same punishment is imposed upon the one who makes unauthorized use of the named mark, designation, or description on signs, in announcements, on billheads, invoices, or other business documents.

SEC. 5. If the stock of a bankrupt, a compromise estate, or of a deceased person is being sold, no other goods must be added, provided the sale take place because of the breaking up of business. A list of the goods, under oath from the executors of the estate, must be given to the proper police authorities before the beginning of the sale and is subject to inspection by them or the directors of the local commercial, industrial, or labor organizations or their authorized agents, who, in the opinion of the authorities are most interested in the inspection.

At a sale of stocks of merchandise that have been bought from a bankrupt or compromise estate or from the estate of a deceased person, it is forbidden in the public advertisements, communications, and the like to refer to the origin of the stocks from such an estate provided the sale includes other goods than those originating in the estate.

Sections 6 to 9, inclusive, relate to the conduct of dissolution sales, clearance sales, and auctions:

SEC. 6. If a sale is announced to take place for the disposition of damaged goods or for other alleged reasons such as the discontinuance of a business, moving, etc., there shall be given to the local police authorities before the beginning of the sale an itemized list of the goods under oath that shall be open to inspection in the same manner as designated in section 5. No goods must be added to the sale thereafter.

SEC. 7. No merchant is permitted to hold more than two yearly season sales, and none of these must last over one month.

Exceptions to this may be permitted, according to the circumstances, by the local police authorities.

SEC. 8. At auctions where the articles for sale originate from several different named estates or persons the advertisements and catalogues shall clearly designate from which estate or person the articles originate.

If the articles for sale are manufactured or procured for the purpose of being sold at an auction it shall be distinctly announced whether they are sold for the account of the party demanding the sale by auction or for the account of some one else.

SEC. 9. Violation of the provisions contained in sections 5 to 8 is punished by fines up to 600 kroner.

Section 10 relates to the misuse of a family name, firm name, business emblem, etc.

SEC. 10. In business relations everyone is forbidden to make use of a name, firm name, or business emblem, or the like, that does not belong to him; likewise to make use of a designation which rightfully belongs to him in such a way that it is intended and calculated to lead to confusion with a legitimate designation of another business house.

Violations hereof are punished by fines up to 600 kroner.

Section 11 relates to the disparagement of another's business.

SEC. 11. He who in order to acquire another's customers spreads incorrect information about his business house calculated to injure the business, whether these concern the proprietor of the business, its goods, or other factors of the business, is punished with fines up to 4,000 kroner, under aggravating circumstances with simple imprisonment up to six months.

Section 12 relates to the unauthorized disclosure of business secrets.

SEC. 12. He who, intentionally or by gross carelessness, gives or uses information about the business or trade secrets gained by reason of contractual relations of confidence is punished with fines up to 4,000 kroner, under aggravating circumstances with simple imprisonment up to six months.

Sections 13 and 14 relate to giving premiums and cutting prices of certain articles.

SEC. 13. In the retail trade the so-called premium (tilgift)[1] is forbidden, except when it has customarily existed and occurs in the form of mere trifles that are not intended to attract the customers of other merchants to one's self.

Violations hereof are punished by fines up to 100 kroner.

Likewise it is forbidden to sell or offer for sale goods in the original wrappers from producers or wholesalers, on which the fixed price for retail sale is indicated, for a lower price, unless the sale falls under the provisions of section 6 or the producer's or wholesaler's permission, or an equivalent authority has been obtained therefor.

Violation of this may, according to the circumstances, be punished by fines up to 2,000 kroner.

SEC. 14. The Minister for Commerce and Navigation is authorized, after conference with the chief organizations of Danish commerce, industry, and labor, to stipulate that certain goods in the retail trade may be sold or offered for sale only in specified units of number, measure, or weight, or with a statement on the article or its wrapper as to the number, measure, or weight, or as to the place of production or origin of the article.

Violations hereof are punished with fines up to 600 kroner.

In case of violation of the above sections, the courts are authorized by section 15 to award damages to the injured party to the extent of 1,000 kroner, even where the extent of the damage can not be ascertained.

A number of decisions have been rendered since the passage of this law relative to the scope of section 13, prohibiting the giving of premiums. Several of these cases follow:

[1] Tilgift has no English equivalent; literally it means good measure or extras.

The Danish Supreme Court[1] gave judgment against the American Tobacco Co. for giving away a coupon with each box of cigarettes sold, and promising to give free a photogravure for 100 of these coupons.

The same court fined a dealer in coffee, tea, and cocoa, etc., who gave to each of his regular customers, so-called "coffee customers," who bought at least one-fourth kilogram of coffee, one-eighth kilogram of tea, or one-fourth kilogram of cocoa, coupons to the value of 12 or 25 øre, which were good in payment for certain glass, porcelain, or leather goods. The court held that these coupons constituted a premium or "tilgift" in the sense of section 13.[2]

Similarly, a merchant was held guilty of unfair competition who gave to his regular customers, provided they bought at least 2 kroner worth of goods during the week, a Saturday "tilgift," consisting of some merchandise.[3]

Defendant had given gratis a box of matches with every sale of three cigars at 17 øre. The court held this was in the nature of a "tilgift" according to section 13 of the law of June 8, 1912, and imposed a fine on defendant.[4]

Defendant gave gratis coupons with each sale of Stollwerck's cocoa. In return for these coupons certain articles of merchandise were given on which was stamped either the name "Stollwerck" or "Trojel & Meyer," the latter being the business name of defendant, who was local agent for Stollwerck. Defendant claimed that these gifts were distributed at the factory's expense for the sole purpose of advertising Stollwerck's cocoa without thereby increasing the prices of goods, and that every retailer who sold this cocoa was obligated by the factory to distribute such advertising articles to purchasers of the factory's products. The court held that section 13 of the law of June 8, 1912, prohibits the giving of a "tilgift" (premium) by retailers without considering for whose account or in whose interest this is done, and that retail dealers under this law should not assist in distributing advertising material of the kind under consideration. The main purpose of this law, the court said, is to put an end to the premium abuse among retailers. The defendant was held guilty and fined.[5]

The selling of goods by retail merchants below the fixed resale price stamped upon the wrappers is punishable under part 3 of section 13.

[1] Højesteret, 7. Nov. 1913, Nr. 281, Direktor American Tobacco Comp. Alfred Christensen mod de Københavnske Handelsforeningers Faellesrepraesentation; Højesteretstidende, 1913, p. 600.

[2] Højesteret, 6 Okt. 1913, Bache mod Christiansen; Højesteretstidende, 1913, p. 456 fol.

[3] Højesteret, 21 Okt. 1914, No. 273, Bache mod Johan Gresel; Højesteretstidende, 1914, p. 504.

[4] Det Offentlige mod Tiltalte Cigarhandler Carl Rasmussen, 8. Juni 1913; Ugeskrift for Retsvaesen, 1913, p. 669.

[5] Det Offentlige mod Tiltalte Materialist Hans Trojel, 28. Januar 1913; Ugeskrift for Retsvaesen, 1913, p. 320.

This provision was applied in the case of a bicycle dealer who had sold bicycle tires for 9 kroner 35 øre on which the manufacturer had stamped a fixed retail price of 12 kroner.[1]

Section 14. Norway.

Several provisions of the Norwegian Penal Code and Trade-Mark Law, relate to certain particular acts of unfair competition. A special law covering the whole subject is also in the course of preparation.

PENAL CODE.—Section 294 of the Penal Code prohibits a person from inducing another to do an unlawful act or from disclosing or using trade secrets without authority. The language of this section is as follows:

SEC. 294. With fine or imprisonment up to six months is punished whoever—

(1) In order to cause or confirm an error unlawfully induces another to commit an act by means of which pecuniary loss is caused to the one who does the act or to the one for whom he acts, or who aids such an act; or

(2) Uses in an unauthorized way any business or trade secret of an establishment in which he is employed or interested or has been employed or interested during the preceding two years, or reveals such a secret for the purpose of enabling anyone else to make use of it, or whoever by seduction or instigation aids or abets such an act.

Public prosecution takes place only if the injured party demands it and public considerations seem to require it.

Section 370 prohibits the circulation of misleading statements regarding articles offered for sale and the misuse of the Geneva cross on articles for sale.

SEC. 370. Whoever, in regard to articles offered for sale, publishes or disseminates incorrect statements concerning their composition, industrial legal protection, or awards of distinction, or whoever publishes or disseminates designations or statements which in such respects are adapted to mislead, is punished by fine. The same applies to him who upon articles intended for sale or upon their covering places without authority the Geneva cross or marks, which create the supposition that the articles enjoy industrial protection, or who has for sale articles which are marked in this manner.

Section 247 prescribes a penalty of fine or imprisonment, not to exceed six months, for inducing a person to believe anything calculated to injure the good name and reputation of another or to expose him to hatred or contempt or the loss of confidence necessary for his position or business. Section 362 prohibits the wilful and negligent sale of foodstuffs as pure or unadulterated, when they are not, and also the manufacture of such articles, if intended to be sold as pure or unadulterated.

[1] Höjesteret, 3 Okt. 1913, Nr. 339, Bache mod Direktor Carl Christian Rammel; Höjesteredstidende, 1913, p. 450 fol.

TRADE-MARK LAW.—Section 5 of the trade-mark law of 1910[1] relates to the rights of the owner of a registered trade-mark.

SEC. 5. The protection obtained by registration brings with it the effect that no one else than the owner of the mark can place the same mark on goods of the same or similar kind that are or are to be offered for sale, or upon their wrappers, or upon advertisements, signs, price lists, business letters, recommendations, bills, and the like, or can offer for sale or sell goods so marked.

This protection is not to hinder anyone from using his name or his firm name as a mark for his goods.

Sections 22 to 24 relate to the unauthorized use of trade-marks, names, or firm names.

SEC. 22. He who on goods that are offered or are to be offered for sale, upon their wrappers or the other objects treated in section 5, unauthorizedly places:

(*a*) Another's mark, protected by registration, for goods of the same or like character;

(*b*) Another's name or firm name; or

(*c*) Anything that is calculated in ordinary transactions to create confusion in these particulars, or who unauthorizedly offers for sale or deals in goods so marked, may, after prosecution by the injured party, forfeit his right thereto.

If he has had knowledge of the other's better right, he is punished with fines or imprisonment up to three months. In this event, as well as if he by his negligence has made himself guilty, he is liable for the damage caused. Public prosecution takes place only on the demand of the injured party.

SEC. 23. Goods that are offered or are to be offered for sale, their wrappers or the other objects treated in section 5, must not unauthorizedly be given the mark or outward appearance which within the business circles concerned is known as the special mark of another establishment for goods of the same or like character, nor must the goods so marked or of such an outward appearance be offered for sale or sold, if thereby there is danger of confusion with reference to the business house from which the goods originated.

He who acts in contravention to this may, after prosecution by the injured party, forfeit the right to use the mark or emblem or to offer the goods for sale.

If he has had knowledge of the other's better right, he is punished with fines and is liable for the damage caused. Public prosecution takes place only on the demand of the injured party.

SEC. 24. He who, on the goods that are offered or are to be offered for sale, on their wrappers or the other objects treated in section 5, places his name or his firm name in such a way that it is calculated to cause confusion with a trade-mark that another rightfully uses for goods of the same or like kind, or who offers or sells goods so marked, may, after prosecution by the injured party, forfeit the right thereto.

If it has been his intention to bring about such confusion as named, he is punished by fines and is liable for the damage caused. Public prosecution takes place only on demand of the injured party.

Section 25 of this law, which prohibits the sale or offering for sale of goods bearing false indications of origin, is as follows:

SEC. 25. On goods that are offered or are to be offered for sale, on their wrappers, or other objects treated in section 5, incorrect information must not be placed regarding the place of origin of the goods, nor must anything be stated

[1] Lov om varemerker og om utilbörlige varekjendetegn og forretningsnavn, av 2. juli, 1910; Thorsen, Lov om Det industrielle retsvern, Kristiania, 1911, p. 39.

that is calculated in any particular to create confusion, nor must goods so marked be offered for sale or sold.

He who acts in contravention to this can be compelled to refrain from using the incorrect statement in connection with the offer of the goods for sale.

If he has used the incorrect statement against his better knowledge, he can be held liable for the damage caused.

If he has had the intention to deceive others with reference to the nature of the goods, their contents, composition, or value, he is punished therefor by fines.

Under the foregoing provision are not included such place names which, according to the usual business customs, are intended to describe the nature of the goods but not their origin.

The King may, however, with reference to agreements with a foreign country, stipulate that imports into the Kingdom of goods with such statements as were treated in the preceding paragraph shall not be permitted unless the goods are accompanied by completely satisfactory explanations that they are genuine goods originating in the country or section of country concerned. In the same manner the King may forbid the offering for sale or the sale within the Kingdom of goods under such statements as named unless the goods are genuine or originate in the country or section of country concerned.

Violation of the prohibition specified in the preceding paragraph is punished with fines.

Sections 26 and 27 relate to the unlawful use of names calculated to produce confusion.

SEC. 26. He who gives his occupation or business undertaking such a name that it is calculated to cause confusion with a name that another already rightfully uses for his occupation or his business undertaking of the same or similar character, may, after prosecution by the injured party, forfeit the right thereto.

If it has been his intention to cause such confusion, he is punished by fines and is liable for the damages caused. Public prosecution takes place only on the demand of the injured party.

SEC. 27. He who has used trade-marks or business emblems in violation of the present law is obliged on the demand of the injured party to change or withdraw the designation. If the withdrawal or change can not take place, the objects on which it is found may be ordered confiscated.

The confiscated objects may, after an agreement between the convicted and the injured parties, be surrendered to the latter for sale as compensation due him.

Section 15. Sweden.

Swedish law contains very few provisions applicable to unfair competitive practices. The Government has appointed a committee, which is now engaged in preparing a special law against unfair competition.

The royal ordinance respecting the prohibition of importation into the realm of goods bearing a false indication of origin of November 9, 1888, provides:[1]

SEC. I. (1) When upon goods imported into the realm from abroad for sale here there is affixed the name of a place, of real estate [landed estate], of a com-

[1] Reports from His Majesty's representatives abroad on the laws in force in the principal foreign countries to prevent the sale of goods bearing a false indication of origin, London, 1911, p. 144.

mercial establishment, or of a tradesman, situated within the Kingdom of Sweden, or any other indication, which shall give the goods the appearance of having been produced in Sweden, such goods shall on their importation be seized and condemned as forfeit.

(2) What is laid down in pargraph 1 shall not apply—

When evidence can be produced that the goods in question are really of Swedish manufacture and had previously been exported from the Kingdom;

When in addition to the above-mentioned indication of Swedish origin on the goods it is there stated in a plain and obvious manner that the goods are of foreign production; or

If it was otherwise made manifest that there was no intention to mislead by false indication of origin.

Section 16. Russia.

Russia has no special law against unfair competition. Several provisions of the Penal Code, the Code of Manufacture, and the Copyright Law of 1911 relate to particular practices of an unfair nature. Section 684 of the Civil Code[1] also contains a general provision of law similar to that used in France and other countries for the prosecution of cases involving unfair competition. It is not known, however, whether this provision has ever been applied to unfair competitive practices or not.

COPYRIGHT LAW.—The Copyright Law of March 20, 1911,[2] modified sections 620 and 622 of the Criminal Code. Section 620 now prohibits the infringement of the rights of authorship, the publishing or multiplying of an infringed literary production for the purpose of selling it, and the arbitrary publication of another's works under one's own name, and section 622 prohibits a merchant from knowingly importing, keeping for sale, or selling articles produced in violation of authorship or patent rights.

CODE OF MANUFACTURE.—Section 161[3] of the Code of Manufacture[3] prohibits the use of trade-marks bearing inscriptions or designs which are repugnant to public order, good morals or propriety, or are false and intended to deceive the purchaser or which are reproductions of honorific distinctions granted to manufacturers or merchants to be worn by them or reproductions of awards and honorary medals which do not show the year of the award.

PENAL CODE.—The Russian Penal Code[4] contains several provisions relating to unfair competition. The infringement of patent

[1] Section 684 of the Civil Code is as follows:

"Every person shall make compensation for injury and loss caused to another by his act or omission, even though the act or omission does not constitute either a crime or a misdemeanor, provided it is proved that he was not forced to do it by the requirements of the law or the Government or in self-protection or by a combination of circumstances which he could not prevent." (Svod Zakonov Grazhdanskikh; Svod Zakonov, Vol. X, Pt. I, p. 110. 2d unofficial ed. by A. A. Dobrovolskii, St. Petersburg, 1913.)

[2] Zakon ob avtorskom prave; Sobranie Uzakonenii, 1911, Pt. I, ch. 560.

[3] Ustav o promyshelennosti; Svod Zakonov. Vol. XI, Pt. II, 2d unofficial ed. by A. A. Dobrovolskii, St. Petersburg, 1913.

[4] Ulozhenie o nakazaniiakh ugolovnykh i ispravitelnykh; Svod Zakonov, Vol. XV, Pt. I, subdiv. VIII, ch. 14.

rights is prohibited by section 1353, the counterfeiting of registered trade-marks by section 1354, and the counterfeiting of registered designs and patterns by section 1357. Section 1355, which prohibits the disclosure of factory secrets, is as follows:

SEC. 1355. Any person belonging to a factory, works, or manufacturing establishment who discloses a process of manufacture used for the production or finishing of goods made in such factory, works, or manufacturing establishment, and kept secret and confided to him as secret, without positive consent of those to whom this secret rightfully belongs and consequently to their detriment, shall be punished by imprisonment for from four to eight months.

Sections 1357[1] and 1357[2] relative to the counterfeiting and fraudulent use of trade-marks are as follows:

SEC. 1357[1]. The manufacturer or merchant guilty of using on goods produced by him or kept by him for sale, or on their wrappers or containers, or in business advertisements, price lists, or business forms, a trade-mark which is an exact reproduction or evident likeness of a similar trade-mark, known to the guilty party to be in the exclusive use of another manufacturer or merchant shall be punished by imprisonment from four to eight months.

The same punishment shall apply to a merchant or manufacturer guilty of keeping in a manufacturing or commercial establishment or of selling goods with the above-mentioned trade-mark known to him to be arbitrarily used.

SEC. 1357[2]. The manufacturer or merchant who is guilty of having placed on goods, or on the wrappers and receptacles which contain them, or in a commercial announcement, price list, or business form, marks bearing forbidden inscriptions or designs, and also who is guilty of keeping goods in an industrial or commercial establishment or of selling goods bearing such marks, shall be liable for the first offense to a fine of not to exceed 100 rubles, and for the second and subsequent offenses to a fine not to exceed 200 rubles.

Section 17. Greece.

Several sections of the Penal Code of Greece and several special laws relate to certain unfair competitive practices. Among the special laws the most important are the law of February 10, 1893, relating to the fraudulent imitation or use of trade-marks, and the new law of December, 1913 (Jan. 8, 1914), concerning unfair competition. The latter enactment which covers a variety of practices resembles the German law of 1909, after which it was evidently modeled.

PENAL CODE.—Among the provisions of the Penal Code,[1] article 396 deals with fraud, article 432 relates to unlawful copying of works of art or of the intellect, and article 446 provides against the disclosure of trade secrets:

ART. 396. Whoever knowingly circulates false statements as being true or unlawfully withholds or suppresses true statements with intent to injure another or gain an unlawful advantage for himself and thereby either injures this other person or gains an unlawful advantage for himself, is guilty of fraud.

Also, whoever knowingly makes use of the fraud of another for his own advantage or to the disadvantage of a third party, is to be considered as a defrauder.

[1] "Strafgesetzbuch des Königreiches Griechenland," Nauplia, 1834. Official text in Greek and German.

ART. 432. Whoever puts books or other publications, musical compositions, copper etchings, drawings, or charts into circulation, through multiplication by means of printing or in any other manner without changing them into a new form, within 15 years from the time of their publication, unless a longer period has been fixed in the privilege granted, without authority from the author, maker, or publisher, or from those who have succeeded to their rights, or their heirs; or whoever within the above-mentioned period circulates copies or reproductions of works of art or of the intellect thus made by others, without authority, is punished by a fine of from 200 to 2,000 drachmas, unless in the privilege granted the penalty is specifically fixed.

In every case circulation is to be stopped by seizure at the instance of the injured party, and after the decree of condemnation has become effective the disposal of the property is to be left to the injured party.

ART. 446. Whoever while in the service of a factory or trade establishment by unauthorized ways or means pries into its secrets, or who has acquired them under obligation of secrecy and betrays such secrets to others, upon complaint or demand of the owner of the factory or trade establishment is punished by imprisonment up to three months, and in case of actual damage by imprisonment from three months to three years.

UNFAIR COMPETITION.—The most recent of the more elaborate foreign laws against unfair competition is the Greek law of December 26, 1913.[1]

Article 1 of this law relates to acts of competition repugnant to good morals.

ART. 1. In commercial, industrial, and agricultural intercourse every act of competition is prohibited which is repugnant to good morals. For every offense suit may be brought to demand cessation of and compensation for the damage caused.

Articles 3 to 5 relate to deceptive advertising of one's own goods.

ART. 3. In public advertisements or announcements which are intended for extensive groups of persons, every incorrect representation which might convey the impression of an unusually favorable offer is prohibited with respect to the various kinds of business referred to in article 1, especially concerning the quality, the origin, the kind and method of production or the scale of prices of the goods or industrial products, the kind and source of supplies, the possession of prizes and other honorific distinctions, or the purpose of the sale, or the quantity of goods for disposal. In case of an offense suit may be brought for retraction of the incorrect statements and for reparation of the damages sustained.

ART. 4. Whoever, for the purpose of conveying the impression of an unusually favorable offer, knowingly publishes, under the circumstances mentioned in article 3, incorrect statements which are adapted to deceive the public, is punished by imprisonment not to exceed six months and by a fine not to exceed 3,000 drachmas, or by one of these punishments.

If the incorrect statements mentioned in the foregoing paragraph are made by an employee or by some other authorized person, not only the employee or authorized person is punished, but also the employer or manager of the enterprise, provided the publication was made with his knowledge.

[1] Law No. 146 of Dec. 26, 1913 (Jan. 8, 1914), relating to unfair competition, Official Gazette, Feb. 9, 1914; taken from the German translation in Öster. Patentblatt, 1914, p. 166 fol.

ART. 5. Pictorial representations and other methods that are intended to replace statements are treated like the latter, and in such cases articles 3 and 4 are applied in an analogous manner. The use of names which in business intercourse serve to designate goods or industrial products, provided provenance is not to be implied therewith, is not subject to the provisions of articles 3 and 4.

In case of violation of articles 3 and 4 it is provided by article 10 that not only fellow tradesmen but also chambers of commerce, business men's associations, and trade associations generally may sue for injunction. It is further provided that compensation for damages shall be made by those violating article 3, who knew or should have known that their advertisement was false. Editors, publishers, printers, and agents of journals are liable for damages only if they knew of the falsity of their statements. Owners or managers of business undertakings or houses are liable for acts of their employees.

Articles 6 to 8 relate to the manner of advertising and conducting closing-out sales and sales of goods from a bankrupt stock:

ART. 6. If, by means of public advertisements or announcements that are intended for extensive groups of persons, a sale of goods is announced, which come from a bankrupt sale but which no longer belong to the bankrupt stock, it is prohibited to announce the goods as having come from the bankrupt sale, and the offender is punished with a fine not to exceed 1,500 drachmas or with imprisonment not to exceed two months, or with both of these punishments.

ART. 7. It is prohibited to announce a sale of goods under the pretext that the business, or a part of the same, is to be dissolved, unless the cause for the dissolution is stated and the business man concerned has previously made a declaration to the president of a court having jurisdiction, which contains the following facts: The cause of the dissolution, the place where it occurs, the time when it begins, the list of goods to be sold, and assurance that neither the declarant nor the former owner of the business has during the past two years conducted a similar closing-out sale, either directly or indirectly, personally or through another person.

The declaration is to be furnished in duplicate. One of these, signed by the president, is delivered to the declarant. The copy filed with the president may be examined by anyone.

The president, at the expense of the declarant, verifies the correctness of the declaration through two experts. Said experts are selected from a list compiled during the month of January of each year by the chambers of commerce or merchants' associations. Where no chamber of commerce or merchants' association exists, the president selects the experts according to his own choice. If the declaration is held incorrect, the president prohibits the closing-out sale. At the same time third parties have the right to institute injunction proceedings.

A closing-out sale conducted according to the above-named conditions must not continue for longer than nine months. The president may, however, in view of special circumstances, grant permission for an extension of this period.

The closing-out sale can be permitted for a period of two years only in case of death, of bankruptcy, and of actual discontinuance of the business.

The closing-out sale is permitted according to the provisions of the preceding articles only in the place in which the declarant exercised his business during six months, unless the president, on written opinion of the experts, shall make some other disposition.

Concerning season closing-out sales at reduced prices customary in trade the above provisions have no application. It is permitted, however, that, upon the recommendation of the Minister of National Economy and upon the assent of the Council of Ministers, the yearly number, the time of the beginning and the ending of such closing-out sales be fixed by royal decree.

If the enterprise is located in a place where there is no court of first instance, then the justice of the peace has jurisdiction.

ART. 8. Whoever fails to make the declaration required by article 7, or knowingly makes it incorrectly; and whoever at a forbidden time or place sells or offers for sale goods which were bought at the dissolution only for the purpose of conducting a closing-out sale, or which were not inserted in the list of the declaration, is punished by imprisonment up to six months or by a fine up to 3,000 drachmas, or both.

According to section 10, injunctive relief is provided for violations of articles 6 and 8 and also for article 7, unless the declaration of the cause of a sale has been submitted to the president of the court of the first instance or to the justice of the peace. Action for damages lies against those who wilfully or negligently violate articles 6, 7, and 8.

Article 9 relates to deception with respect to goods in the retail trade:

ART. 9. Upon recommendation of the Minister of National Economy, and with the assent of the Council of Ministers, a royal degree may require that the authorized retail sale of certain classes of goods shall be made only in definite units of number, weight, or measure, or only if measure or weight and place of manufacture or provenance are indicated upon the goods, their wrappers or containers.

Whoever violates the provisions of the foregoing paragraph is punished by fine up to 300 drachmas and by imprisonment up to two months, or by either of these punishments.

Articles 11 and 12 relate to disparagement and misrepresentation of another's goods and services:

ART. 11. Whoever, for purposes of competition, circulates or publishes reports concerning the business and undertakings of another, the proprietor of the business or its manager, the goods or industrial services of a third person, which are likely to injure his business and business credit, is liable, provided the correctness of the statements has not been proved, for compensation to the injured party for the injury sustained. Besides, the injured party is entitled to institute injunction proceedings against any further circulation of the incorrect statements.

If it is a case of confidential communications, in which the party making or receiving them has a justifiable interest, discontinuance of the communication may be demanded only if said facts prove to be incorrect.

If the person who imparted the information knew or must have known that it was incorrect, he is obliged to make compensation for any injury committed.

The provisions of the last paragraph of article 10 have analogous application.

ART. 12. Whoever knowingly circulates or publishes false reports concerning the undertaking or business of another, or the owner or manager of the business or undertaking personally, or concerning the goods or industrial services, which are done to injure the undertaking, is punished by imprisonment up to six months and by fine up to 3,000 drachmas, or with both of these penalties.

Owners and managers of undertakings are subject to the same punishment if with their knowledge the rumors or assertions in question were circulated by one of their employees or representatives.

Injunctive relief is provided by section 10 in the case of violation of this section. Damages may also be recovered if the act was willfully or negligently done.

Articles 13 and 14 relate to the misappropriation of names, commercial designations, and distinguishing marks and signs.

ART. 13. Whoever in his business uses a name, trade term, or any other special distinguishing mark in such a way as to cause confusion with the name, trade term, or special distinguishing mark lawfully used by another may be enjoined by the latter from using the same. He is also bound to compensate the injured party for the injury caused if he knew or should have known that the misuse might cause confusion. In general those marks of a business or undertaking are also to be considered as special distinguishing marks which are so considered by the trade.

The form or special make-up of the goods and the packing and covering are considered as special distinguishing marks in so far as they are recognized in the respective trades to distinguish these goods from similar goods.

The provisions of the last paragraph of article 10 have analogous application.

ART. 14. Whoever, in business intercourse, knowingly and willfully appropriates the name, trade term, or special distinguishing mark of any publication, or trade undertaking, for the purpose of causing confusion with the name, trade designation, or special distinguishing mark lawfully used by another person, is punished by imprisonment up to six months and a penalty up to 3,000 drachmas, or with one of these penalties.

The provisions of the preceding paragraph and of the above articles have no application with respect to the protection of marks of trade and industry for which the respective existing legal provisions remain in force and have application.

The application of the provisions of the first paragraph and of the above article is not excluded in the cases where the use of a foreign name, a foreign trade term, or a foreign special distinguishing mark and token occurs with slight variations, in so far as thereby the danger of confusion does not seem to be excluded.

Article 15 authorizes the court in case of conviction under articles 13 and 14 to remove the distinguishing mark, or, if this is impossible, to order the destruction of the product bearing it, provided the misappropriation was intentional.

Articles 16 to 18 relate to the unauthorized disclosure of trade secrets.

ART. 16. Whoever as employee, workman, or apprentice in a trade or industrial establishment or undertaking, without authority, divulges to third parties for purposes of competition, or with the intention to injure the owner of the

establishment or undertaking, the business or factory secrets which were intrusted to him during his employment, or which he learned in any other way during the period of his employment, is subject to imprisonment up to six months and fine up to 3,000 drachmas, or either of the two penalties.

Whoever, without authority, for purposes of competition, uses these secrets or transmits them to third parties, whether he got them in the manner mentioned in the preceding paragraph or as a result of personal observation by unlawful means or means repugnant to good morals, is subject to the same penalty.

ART. 17. Whoever, without authority, makes use of or transmits to third parties business secrets such as plans and designs of a technical nature, sketches, originals, and specifications intrusted to him on account of his business connections, is subject to the penalty contained in the above-mentioned article.

ART. 18. Whoever violates the provisions of sections 16 and 17 shall also be required to compensate for the injury caused.

The penalty provided in article 16, but reduced one-half, is imposed upon anyone who for purposes of competition induces another to do an act prohibited by article 16, paragraph 1, and article 17.

The remaining articles of this law deal with procedure.

Section 18. Roumania.

TRADE-MARK LAW.—The Roumanian trade-mark law of April 15–27, 1879,[1] contains the following provisions relating to the fraudulent use of trade-marks:

ART. 6. Persons have not the right to appropriate the trade-mark adopted by another merchant or manufacturer to mark their products or when the name is adopted for the title of a firm.

ART. 12. A fine of from 50 to 2,500 francs and imprisonment for from three months to three years or either of these penalties may be imposed as follows:

(1) On those who counterfeit a trade-mark or who use a counterfeit trade-mark;

(2) On those who fraudulently apply to their articles of manufacture or commerce a trade-mark belonging to others;

(3) On those who have knowingly sold or have taken for sale one or more products bearing a fraudulent mark.

ART. 13. A fine of from 50 to 1,500 francs and imprisonment from one month to one year or either of these two penalties may be imposed as follows:

(1) On those who, while not having counterfeited a trade-mark, have imitated in a fraudulent manner the make of the article so as to deceive the purchaser or who have employed a fraudulent imitation of the trade-mark;

(2) On those who employ a trade-mark calculated to deceive the purchaser as to the nature of the product;

(3) Those who have knowingly sold or taken for sale one or more products bearing the fraudulent imitation of a trade-mark, being calculated to deceive the purchaser as to the nature of the product.

ART. 25. No article having a simulation of the trade-mark of a Roumanian product can be imported into Roumania and all such articles are prohibited from transportation and may be seized wherever found, either by the customs officials or by the Public Minister at the suit of the parties injured. * * *

[1] See Patent and Trade-Mark Review, Vol. XI, p. 346 fol.

Section 19. Bulgaria.

PENAL CODE.—Article 243 of the Bulgarian Penal Code[1] provides against undermining another's mercantile or business credit.

ART. 243. Whoever knowingly makes an untruthful assertion which undermines the mercantile or business credit or the reputation of a person, company or establishment, or the confidence in the ability of a person respecting his profession or trade, is punished by imprisonment from one month to one year and by a fine up to 1,000 lew.

If this is done publicly by distribution of printed matter, a picture or a writing with the knowledge of the perpetrator, imprisonment from one month to two years and a fine up to 2,000 lew applies.

TRADE-MARK LAW.—Articles 43, 44, and 45 of the Bulgarian trade-mark law of January 14–27, 1904,[2] prohibit the infringement of trade-marks.

ART. 43. He is guilty of infringing the present law and shall therefore be liable to the fines provided by this law—except where it is proved that he has acted without bad faith—any person who—

(*a*) Imitates a mark of another;

(*b*) Uses a mark registered by another;

(*c*) Employs an imitation of a mark previously registered;

(*d*) Prepares stamps, clichés, machines, and other special instruments intended for the imitation or counterfeiting of another mark;

(*e*) Places on his goods false commercial inscriptions;

(*f*) Employs the annotation "marque enregistrée" or "M. E." as a mark or as its supplement;

(*g*) Has at disposal stamps, clichés, machines, and other instruments intended for counterfeiting or imitating another mark;

(*h*) Employs as a mark or puts on the papers of his establishment, without having the right, the arms of the Principality, those of the Princely House, in any imitation whatever of those arms or the decorations of the State, the portraits of the Sovereign or members of his family;

(*i*) Employs without any authority the emblem of the "Red Cross," its imitation, or the denomination "Red Cross," or the portraits of statesmen or public men;

(*k*) Allows to figure upon his goods, upon the wrappers or upon the vessels, medals, diplomas, copies of testimonials, or their imitation, which he does not possess, or else represents them in colors which do not correspond with their appearance;

(*l*) Employs in general any kind of inscription or designation which may give rise to the belief that the goods are of local origin.

ART. 44. He is considered equally guilty of infraction of the present law who shall sell, exhibit, or possess, with intent to sell for some commercial or industrial purpose, goods or objects bearing one of the signs or inscriptions enumerated in paragraphs *b*, *c*, *e*, *f*, *h*, *i*, *k*, *l* of the preceding article, unless he can prove—

(*a*) That, notwithstanding all the steps which he has taken in order to avoid any infringement of the law, it has been impossible for him to doubt at the time when the infringement occurred the authenticity of the mark which has been used or of the commercial inscription which he has appropriated for himself;

(*b*) That, upon the request made by the party damaged or in his name, he (the infractor) has furnished all the information that it has been possible for him to furnish concerning the person who furnished him the goods or the objects in question;

[1] Das Bulgarische Strafgesetz vom 2. Feb. 1896. Berlin, 1898.

[2] Patent and Trade-Mark Review, Vol. III, p. 1017.

(c) That he has acted without bad faith.

ART. 45. Any person who shall be deemed guilty of the offenses enumerated in articles 43 and 44 shall be punished by a fine of from 500 to 4,000 francs or by imprisonment for a term of from three months to one year, to which a fine of 3,000 francs may also be added. Besides the penalties provided in the preceding clause,[1] the party to whom the damage has been caused shall also have the right to demand from the offender indemnity for the sustained damages and losses. Upon the request of the party who has suffered the damage the court may decide that the sentence be published in the "Official Journal" for his account and, at least, in one of those papers having the largest circulation in the country.

Section 20. Turkey.

Turkey has no special law against unfair competition. However, the courts allow a claim for damages against a person who in an improper manner draws to himself the clientele of a competitor.[2]

PENAL CODE.—Articles 240 and 241 of the Penal Code provide against deceiving purchasers as to the quality or quantity of goods and against the unauthorized reproduction of books or other articles.[3]

ART. 240. Whoever cheats a purchaser as to the fineness of gold or silver or the quality of a false jewel sold as a genuine gem or of any other kind of merchandise, or commits fraud as to the quantity of things sold by using defective weights or measures, is imprisoned for from three months to one year and, in addition to being caused to make good the loss, a fine not exceeding the one-fourth of the amount of the compensation and in any case not less than 3 mejidiehs[4] is taken and his defective weight or measure is broken and destroyed.

ART. 241. As the person who prints or causes to be printed a book contrary to the privileges of authors or makes or causes to be made a thing the manufacturing or doing of which has been restricted to an individual or a company as a privilege will have committed a sort of forgery, the books, etc., caused by him to be printed or the things caused by him to be made are seized and given to the holder of the privilege, and a fine of from 5 mejidieh gold pieces[5] to 100 mejidieh gold pieces is taken; and from those who import into the Ottoman Empire such as have been printed or manufactured in this manner abroad a fine of likewise from 5 mejidieh gold pieces to 100 mejidieh gold pieces is taken; and those who knowingly sell such printings or manufactures are punished by the taking of a fine of from 1 mejidieh gold piece to 25 mejidieh gold pieces.

TRADE-MARK LAW.—Articles 21 and 23 of the trade-mark law of May 11, 1888, provide against false designations of provenance.[6]

ART. 21. There shall be punished in accordance with the degree of the gravity of the offense, by a penalty of from 2 Turkish pounds to 50 Turkish pounds or by imprisonment of from one month to six months or even by these two penalties at the same time—those who have indicated in characters of one sort or another

[1] An obvious error in the English translation of this phrase was corrected by comparison with the law in Bulgarian.

[2] Lobe, op. cit., Bd. I, p. 114.

[3] Bucknill and Utidjian, The Imperial Ottoman Penal Code, London, 1913; also see Nord, Das türkische Strafgesetzbuch, Berlin, 1912.

[4] Mejidieh—a silver coin of 20 piasters, worth 3s. 4d., or 83 cents.

[5] Mejidieh gold piece=100 gold piasters, or $4.38.

[6] Marques de fabrique, règlement, 11 mai, 1888. See G. Young, "Corps de droit Ottoman," Vol. IV, p. 37, fol. Oxford, 1906.

upon products a locality of the Ottoman Empire other than that of the real provenance of such products, as well as those who have knowingly sold or offered for sale products of this kind.

ART. 23. In those cases where products with a counterfeited mark and bearing the name of any country whatsoever are unloaded at the customhouse, they shall not be prohibited from entry, without prejudice, however, to the right of the manufacturers of the products whose marks are counterfeited to bring suit, if they have been counterfeited abroad; if Ottoman products counterfeited abroad and also bearing a counterfeited mark are imported into the Ottoman Empire they shall be prohibited from entry and returned to their proprietor. * * *

Section 21. Brazil.

The laws of Brazil relating to unfair competition are found in the Penal Code, in the trade-mark laws of 1897, 1904, and 1905, and in the customs law of 1899.

PENAL CODE.[1]—Articles 353 and 354 of the Penal Code relate to the fraudulent use of a trade-mark.

ART. 353. To reproduce, without authorization of the proprietor or of his legitimate representative, by any means whatever, in whole or in part, a mark of manufacture or trade duly registered and published:

§ 1. To use the trade-mark of another, or a counterfeited trade-mark under the conditions indicated above;

§ 2. To sell or expose for sale goods bearing the trade-mark of another, or a trade-mark counterfeited in whole or in part;

§ 3. To imitate a mark of manufacture or trade in such a way as to deceive the buyer;

§ 4. To use a trade-mark thus imitated;

§ 5. To sell or offer for sale objects bearing an imitated trade-mark;

§ 6. To use a name or firm name that one does not own, whether this name or firm name forms or not part of a registered trade-mark;

PENALTIES.—A fine of 500 to 2,000 milreis in favor of the nation, and of 10 to 50 per cent of the value of the objects on which the delict bears, in favor of the proprietor of the trade-mark.

ART. 354. In order that, in the cases indicated above, imitation exist, it is not necessary that the imitation of the trade-mark be complete; it is sufficient, whatever be the existing differences, that there be possibility of error or confusion when the differences between the two marks can not be recognized without careful examination or comparison.

PARAGRAPH UNIQUE.—The usurpation of a name or of a firm name is considered as existing, whether the reproduction be complete or with additions, omissions, or changes, if there exist the same possibility of error or of confusion of the buyer.

Article 355 relates to the unlawful use or sale of marks of distinction, trade-marks repugnant to good morals, and false designations of provenance.

ART. 355. To use in a mark of manufacture or trade without competent authorization, arms, coats of arms, public or official designations, national or foreign;

[1] Codigo Penal de 11 Outubro de 1890.

§ 1. To use a trade-mark which offends public decorum;

§ 2. To use a trade-mark which contains indication of a place or of an establishment other than that of the provenance of the merchandise or the product, whether or not that indication be accompanied by a fictitious name;

§ 3. To sell or expose for sale merchandise or a product in the conditions indicated in the present article;

PENALTY.—A fine of 100 to 500 milreis in favor of the state.

DECREE OF NOVEMBER 3, 1897.—The decree of November 3, 1897,[1] together with the regulation of December 17, 1897, forbids the importation and manufacture of labels for liquors, pharmaceutical preparations, or other national products calculated to deceive as to the provenance of the goods; also the sale of domestic products labeled in a foreign language.

ART. 1. It is prohibited:

(*a*) To import and to manufacture labels which are applied in the manufacture of liquors and all other national products, for the purpose of selling them as if they were foreign.

(*b*) To put on sale pharmaceutical preparations without the declaration of the name of the manufacturer, of the product, and of the place of origin.

(*c*) To put on sale domestic merchandise or manufactured products under a label in a foreign tongue.

§ 1. Offenders of the provision in letter (*a*) shall be liable in addition to the penalties of the Penal Code, to a fine of 1,000 to 5,000 milreis; and those who contravene the prohibitions in letters (*b*) and (*c*) shall be punished by the seizure of the labeled products, and also by a fine of 20 to 500 milreis.

§ 2. In the prohibition against putting on sale domestic products furnished with labels in a foreign tongue, letter (*c*), there are not included labels which, without involving a fraudulent imitation of foreign trade-marks, contain the names of the manufacturers, of the factory, and of the locality where this is situated, or the declaration, "National industry," in very plain letters, this simple indication not being admissible when the labels are intended for food products.

§ 3. In the prohibition against importing labels, capsules, or envelopes, included under letter (*a*) of article 1, there are not included those imported by factories or commercial houses, which are branches or the headquarters of other establishments in Europe.

§ 4. Importers of said merchandise shall be obliged to prove by commercial contracts, duly registered with the commercial boards, that they are in the meaning of the preceding paragraph.

TRADE-MARK LAW OF SEPTEMBER 24, 1904.—The trade-mark law of September 24, 1904,[2] which is a modification of the trade-mark law of October 14, 1887, contains several provisions applicable to unfair competition.

Article 13, which is similar to article 353 of the Penal Code given

[1] Decreto N. 452 de 3 de Novembro de 1897; Collecção das leis da Republica dos Estados Unidos do Brazil de 1897.

[2] Decreto N. 1236, de 24 de setembro de 1904, modifica o decreto N. 3346 de 14 de outubro de 1887, sobre marcas de fabrica e de commercio. See Bento de Faria, Das Marcas de Fabrica e de Commercio e do Nome Commercial. Rio de Janeiro, 1906, p. 413.

above, prohibits the unlawful use or imitation of another's trade-mark or the sale of goods bearing false trade-marks:

ART. 13. He shall be punished with imprisonment for six months to one year and with a fine of from 500 to 5,000 milreis in favor of the State, who—

1. Uses the authentic trade-mark of another on a product of false provenance.

2. Uses the trade-mark of another, counterfeited in whole or in part.

3. Sells or exposes for sale objects bearing the trade-mark of another when those objects are not furnished by the proprietor of the trade-mark.

4. Sells or exposes for sale objects bearing the trade-mark of another, counterfeited in whole or in part.

5. Reproduces by any means whatever, in whole or in part, a mark of manufacture or of trade duly registered and published without the authorization of the proprietor or of his legitimate representative.

6. Imitates a mark of manufacture or of trade in a way to confuse the consumer.

7. Uses a trade-mark thus imitated.

8. Sells or exposes for sale objects bearing an imitated trade-mark.

9. Uses a name or firm name not belonging to him whether it forms or does not form part of a registered trade-mark.

§ 1. In order that imitation intended by Nos. 6 to 9 of the present article take place it is not necessary that the resemblance to the trade-mark be complete; it is sufficient, whatever may be the actual differences, that there may be possibility of error or confusion in the sense of article 8, No. 6, last part.

§ 2. Usurpation of name or of firm name referred to in Nos. 5 and 6 is regarded as existing whether the reproduction be complete or with additions, omissions, or changes if there is present the possibility of error or confusion of the consumer.

Article 14 relates to the unlawful use or sale of marks of distinction, provenance, or such as are repugnant to good morals.

ART. 14. He shall be punished with a fine of 100 to 500 milreis in favor of the State who—

1. Without competent authorization uses as a mark of manufacture or trade, arms, coats of arms, or public or official designations, national or foreign.

2. Uses a mark which offends public decorum.

3. Uses a mark of manufacture or trade which contains the indication of locality or establishment which is not that of the provenance of the merchandise or the product whether or not such indication be accompanied by a name that is fictitious or another's.

4. Sells or exposes for sale merchandise or products bearing marks that come under the conditions of Nos. 1 and 2 of this article.

5. Sells or exposes for sale merchandise or products that come under the conditions indicated under No. 3.

DECREE OF JANUARY 10, 1905.—The decree of January 10, 1905,[1] which contains regulations for the execution of law No. 1236, of September 24, 1904, provides against various unfair practices:

[1] Approva o regolamento para execução da lei N. 1236 de 24, de Setembro de 1904, sobre marcas de fabrica e de commercio.

Articles 11 to 14 relate to designations of provenance.

ART. 11. By indication of provenance of products is understood the designation of the geographic name which corresponds to the place of manufacture, of elaboration, or of extraction of the same products. The name of the place of production belongs cumulatively to all the producers established therein.

ART. 12. No one has the right to make use of the name of a place of manufacture to designate a natural or artificial product manufactured at or coming from another place.

ART. 13. It will not be a false indication of provenance when it is a question of the designation of a product by means of a geographical name which, having taken on a generic character, designates, in trade language, the nature or the kind of product. This exception is not applicable to products of the vine.

ART. 14. Products bearing a false indication of provenance can be seized by order of the Public Prosecutor or at the request of the interested party.

Article 40 provides the penalties for the unlawful use or imitation of another's trade-mark or the sale of goods bearing false trade-marks.

ART. 40. He shall be punished with imprisonment for six months or one year and with a fine in favor of the State of 500 to 5,000 milreis, who:

1. Uses the authentic trade-mark of another upon a product of false provenance.

2. Uses the trade-mark of another counterfeited in whole or in part.

3. Sells or put on sale objects bearing the trade-mark of another when those objects are not supplied by the proprietor of the trade-mark.

4. Sells or puts on sale objects bearing the trade-mark of another counterfeited in whole or in part.

5. Reproduces without authorization of the proprietor or of his legitimate representative, by whatever means, in whole or in part, a trade-mark of manufacture or trade duly registered and published.

6. Imitates a mark of manufacture or of trade in a way that may deceive the consumer.

7. Uses a mark thus imitated.

8. Sells or puts on sale objects bearing an imitated trade-mark.

9. Uses a name or firm name which does not belong to him, whether or not it forms a part of a registered trade-mark.

§1. In order that there be imitation in the sense of Nos. 6 to 9 of this article it is not necessary that there be complete resemblance in the trade-mark, it suffices that, despite the differences, there be the possibility of error or of confusion according to the terms of article 8, No. 6, last part.

§2. Usurpation of name or of firm name is considered to exist, according to the terms of Nos. 5 and 6, whether the reproduction is complete, or with additions, omissions, or alterations if there be the same possibility of error or of confusion of the consumer. (Arts. 13 and 37 of the law.)

Article 41 provides against unauthorized use of another's mark of distinction or the use of indecorous trade-marks, or those which contain false indications of provenance:

ART. 41. He shall be punished with a fine of from 100 to 500 milreis in favor of the State, who—

1. Without competent authorization uses as a trade-mark of industry or of commerce arms, coats of arms, or public or official designations, national or foreign.

2. Uses a trade-mark which offends public decorum.

3. Uses a mark of manufacture or of trade which contains the indication of locality or of establishment which is not that of the provenance of the merchandise or the product, whether or not such indication be accompanied by a fictitious or a borrowed name.

4. Sells or puts on sale merchandise or products bearing a trade-mark under the conditions indicated in Nos. 1 and 2 of this article.

5. Sells or puts on sale merchandise or products under the conditions indicated in No. 3. (Arts. 14 and 37 of the law.)

CUSTOMS LAW OF NOVEMBER 14, 1899.—Article 45 of the customs law No. 641 of November 14, 1899,[1] relates to the importation of merchandise furnished with labels in the Portuguese language.

ART. 45. National factories are not permitted, under the terms of the law No. 452 of November 3, 1897, the use of labels written in whole or in part in a foreign language. The importation of merchandise manufactured abroad which bear labels written in whole or in part in Portuguese is not permitted except when imported from Portugal or when intended for use by factories.

Section 22. Argentina.

The law relating to industrial, commercial, and agricultural trade-marks[2] contains several provisions applicable to unfair methods of competition.

Article 43 provides against infringing another's trade name.

ART. 43. Whoever desires to carry on an industry, trade, or branch of agriculture already carried on by another person, under the same name or conventional designation, shall adopt a modification which shall make this name or designation clearly distinguishable from that employed by the older house or establishment.

Article 48 relates to counterfeited trade-marks.

ART. 48. There shall be punished by a fine of from 20 to 500 pesos in national money and imprisonment of from one month to one year, the corporal penalty not being redeemable in money:

(1) Those who counterfeit an industrial, trade, or agricultural trade-mark.

(2) Those who use counterfeited trade-marks.

(3) Those who fraudulently imitate a trade-mark.

(4) Those who knowingly place on their products or articles of commerce the trade-mark of another or a trade-mark fraudulently imitated.

(5) Those who knowingly sell, place on sale, or facilitate the sale of counterfeited trade-marks, or who sell authentic trade-marks without the knowledge of their owners.

(6) Those who knowingly sell, offer for sale, or facilitate the sale or circulation of articles with counterfeited or fraudulently imitated trade-marks.

(7) All those who with fraudulent intention place or cause to be placed on an article of merchandise or product a declaration or any other description which is false with respect to its nature, quality, quantity, number, weight, or

[1] Lei N. 641 de 14 de Novembro de 1899, estabelece o processo de arrecadação dos impostos de consumo; Collecção das Leis da Republica dos Estados Unidos do Brazil de 1899, Vol. 1, p. 59 fol.; Rio de Janeiro, 1902.

[2] Ley núm. 3975 de las marcas de fábrica, comercio y agricultura, á 14 de noviembre de 1900; Leyes Nacionales sancionadas en el Periodo Legislativo de 1900, p. 79.

measure, or to the place or the country of manufacture or shipment, or with respect to medals, diplomas, mentions, recompenses, or honorific distinctions gained in exhibitions or competitions.

(8) Those who knowingly sell, place on sale, or facilitate the sale of merchandise or products bearing any of the false declarations mentioned in the foregoing paragraph.

In case of repetition these punishments shall be doubled.

Article 53 relates to confiscation of goods falsely marked, and article 58 provides that persons circulating goods falsely marked must furnish information with respect to their source of supply.

Section 23. Chile.

The laws of Chile relating to unfair competition are contained in the Penal Code and in the trade-mark laws of 1874 and 1898.

PENAL CODE.—Articles 185 and 190 of the Penal Code[1] prohibit certain unfair practices. Article 185 relates to counterfeit trade-marks, seals, stamps, etc.

ART. 185. Whoever counterfeits tickets for the transportation of persons or goods or for public gatherings or exhibitions, with the intention of making use of them or fraudulently putting them in circulation, as also the one who uses them or puts them in circulation, although he knows that they are counterfeit; further, whoever counterfeits seals, stamps, or trade-marks of any authority, of a private banking establishment, trade or industrial undertaking, or of an individual, or whoever knowingly makes use of such false seals, stamps, or trade-marks, shall be punished with minor imprisonment in one degree or another and with a fine of 100 to 1,000 pesos.

Article 190 relates to the fraudulent use of a manufacturer's name or trade name.

ART. 190. Whoever puts upon manufactured products the name of a manufacturer who is not the maker of such articles, or the firm name of a factory which is not that of the actual manufacture, shall be punished with minor imprisonment from the lowest to the middle degree and with a fine of 100 to 500 pesos.

The same punishments shall be applicable to every merchant, commission agent, or seller who knowingly has placed on sale or put in circulation goods which are marked with fictitious or altered names.

TRADE-MARK LAW OF NOVEMBER 12, 1874.—The trade-mark law of November 12, 1874,[2] contains certain provisions applicable to unfair competition:

Article 11 of this law relates to counterfeiting of trade-marks.

ART. 11. Whoever shall counterfeit, alter, or use in a fraudulent way marks or labels such as those with which the present law is concerned shall be punished with the penalties established by the Penal Code. (Arts. 185, 190, and 191.)

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[1] Código Penal, Santiago, Noviembre 12 de 1874.

[2] Ley de Marcas de fábricas y de comercio (Noviembre 12 de 1874). Recueil général de la législation et des traités concernant la propriété industrielle, Berne, 1899, tome III., p. 228.

Article 12 provides for confiscation of goods bearing counterfeit trade-marks.

ART. 12. Objects bearing counterfeit trade-marks shall be confiscated for the benefit of the injured party, and the instruments that have served for the counterfeiting shall be destroyed.

TRADE-MARK LAW OF OCTOBER 24, 1898.—The trade-mark law of October 24, 1898,[1] declares that the courts in deciding cases under article 11 of the law of November 12, 1874, shall be governed by good conscience, and reads as follows:

In suits which occur to prosecute the responsibility established by article 11 of the law of November 12, 1874, the tribunals shall decide according to conscience, notwithstanding the differences which may exist between the registered trade-mark and that which is the object of the penal action, whether or not there was counterfeiting, alteration, or fraudulent use, referred to in the said article.

Section 24. Peru.

The Peruvian trade-mark law of December 19, 1892,[2] contains certain provisions applicable to unfair competition.

Articles 23, 24, and 25 relate to counterfeiting trade-marks:

ART. 23. The usurpation of the property right in a new trade-mark shall be punished with a fine of from 25 to 500 soles or with imprisonment of from 40 days to 6 months at the most; they shall be liable to this penalty: First, who counterfeit or change in any manner whatever a trade-mark of commerce or manufacture; second, who put on their own products or articles of commerce a mark belonging to another person; third, who knowingly sell, offer for sale, or consent to sell or to put in circulation articles which bear trade-marks that are counterfeited or fraudulently affixed; fourth, who knowingly sell, offer for sale, or accept what is sold to them with counterfeited trade-marks, and even with authentic trade-marks without the knowledge of the legitimate proprietors; fifth, who with intention to defraud, mark articles or have them marked with trade-marks or false designations concerning their kind, quality, quantity, number, weight or measure, or the country of provenance or of manufacture; sixth, who knowingly sell, offer for sale, or accept articles sold to them with the false designations to which the preceding number relates.

ART. 24. In case of repetition the penalty shall be doubled.

ART. 25. In order that there be infringement or usurpation it shall suffice that the counterfeited trade-mark has been affixed to a single object.

Article 26 provides that persons circulating goods bearing counterfeited marks shall reveal the source of their supplies.

ART. 26. Those who may have sold or put on sale articles bearing a counterfeited trade-mark, thus violating or usurping legitimate rights, must communicate in writing to the proprietor of the trade-mark the name and address of the persons from whom they have made the purchase or from whom they have

[1] Lei Núm. 1094, de Marcas rejistradas, 24 de Octubre de 1898; Boletin de las Leyes i Decretos del Gobierno, Lib. LXVII, 1898, p. 742.

[2] Loi du 19 déc. 1892 sur les marques de fabrique; Recueil général de la législation et des traités concernant la propriété industrielle, Berne, 1899, tome III, p. 488.

received the offer of sale and the date at which negotiations began. The one who should refuse to furnish this information can be compelled to do so by the courts under penalty of being regarded as an accomplice or receiver of stolen goods.

Articles 27 and 28 relate to the confiscation and destruction of goods bearing counterfeited marks:

ART. 27. The articles bearing the counterfeited trade-mark which shall be found in the possession of the counterfeiter or his agent shall be seized and sold, and the proceeds of the sale shall be used for the payment of the legal expenses and for the indemnity established by law; the rest shall go to the schools of the provinces in which the seizure shall have taken place.

ART. 28. The counterfeited trade-marks which shall be found in the possession of the offender, as well as the instruments and tools used for the counterfeiting, shall be destroyed.

ART. 29. The right to criminally accuse the counterfeiters belongs exclusively to the person injured, but as soon as prosecution shall have begun the public prosecutor shall intervene. The plaintiff shall be able, however, at any time before the pronouncement of sentence, to withdraw the accusation and to withhold prosecution.

ART. 30. Injured persons may bring suit for damages before the civil tribunal against the authors of the fraud and their accomplices. The judgment shall be published at the expense of the condemned. Suit is outlawed three years after the infraction is committed and one year after the proprietor has become cognizant of this offense.

Article 31 relates to the usurpation of another's name:

ART. 31. In the case of usurpation of name the same regulations which have governed trade-marks shall be applicable.

Section 25. Japan.

Japan has no special law against unfair competition, but several articles of the Civil, Penal, and Commercial Codes, as well as of the laws relating to trade-marks, patents, and designs would seem to be applicable to cases of unfair competition.

CIVIL CODE.—Articles 709 and 710 of the Civil Code of Japan are similar to articles 1382 and 1383 of the French Civil Code.[1]

ART. 709. A person who has intentionally or negligently violated the right of another is bound to compensate any damages resulting in consequence. * * *

ART. 710. Irrespective of whether the person, liberty, or honor (reputation) of another is injured or his property rights are violated, the person who is bound to make compensation for damage in accordance with the provisions of the preceding article must make also compensation even for damage other than that to his property.

PENAL CODE.—Article 233 of the Penal Code[2] provides against disparaging another.

ART. 233. Whoever by spreading a false rumor or by means of deceit injures the credit of another, or hinders him in the exercise of his calling, is punished by imprisonment up to three years or by a fine up to 1,000 yen.

[1] Annotated Civil Code of Japan, by J. E. de Becker, London, 1909.

[2] Strafgesetzbuch für das kaiserlich japanische Reich vom 23, April 1907. Berlin, 1908, p. 43.

COMMERCIAL CODE.—The Commercial Code of Japan[1] contains several articles which relate to the confusion of trade names, some of which specifically prohibit certain practices in the use of trade names as unfair competition. The language of articles 19, 20, 22, and 23, which are the most pertinent in this connection, is as follows:

ART. 19. A trade name already registered by another person can not be registered within the same Shichoson[2] for the same business.

ART. 20. He whose trade name has been registered can ask for an injunction to restrain other persons from using the same or a similar trade name for the purpose of unfair competition. In such case damages can be claimed.

He who uses the trade name already registered by another person within the same Shichoson for the same business is presumed to use it for the purpose of unfair competition.

ART. 22. In case both the trade name and the business are transferred, unless the parties expressly provide otherwise, the transferor can not carry on the same business within the same Shichoson for a period of 20 years.

If the transferor has promised not to carry on the same business, such promise has its validity only in the same Fu[2] or Ken[2] for a period of not more than 30 years.

The transferor, irrespective of the provisions of the preceding paragraphs, can not carry on the same business for the purpose of unfair competition.

ART. 23. The provisions or article 22 are applicable where the business is transferred exclusive of the trade name.

Article 17 of this code requires that a business association shall indicate the specific form of association in its trade name, and article 18 prohibits, under penalty of a fine, the use of a word indicating a business association in the trade name if no such association exists.

TRADE-MARK LAW.—The Trade-Mark Law (No. 25) of April 2, 1909,[3] contains the following provisions relating to fraudulent and deceptive trade-marks.

ART. 23. Persons who come under any one of the following subheadings shall be punished with penal servitude for a period not exceeding five years, or with a fine not exceeding 1,000 yen.

(1) A person who uses for identical goods the registered trade-mark of another person, or who uses for identical goods a vessel or wrapper, etc., which bears the registered trade-mark of another person, or who transmits or sells such goods, or who keeps them for the purpose of transmitting or selling them.

(2) A person who transmits or sells the registered trade-mark of another, or vessels, or wrappers, etc., bearing such mark, with the intention that they shall be used for identical goods, or who keeps them for the purpose of transmission or sale.

(3) A person who counterfeits or imitates the registered trade-mark of another person, with the intention of using it, or causing it to be used on identical goods.

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[1] Commercial Code of Japan, by Yang Yin Hang, Boston, 1911.

[2] The terms Shichoson, Fu, and Ken are Japanese words designating administrative divisions of the Japanese Empire. There are three Fu (Tokyo, Kyoto, and Osaka) and 42 Ken, and they have similar administrative organizations. The Shichoson is a subordinate administrative division.

[3] Patent and Trade-Mark Review, Vol. VII, p. 2841, fol.

(4) A person who transmits or sells counterfeits of or imitations of trade-marks with the intention that they shall be used on identical goods, or who uses them on identical goods.

(5) A person who transmits or sells identical goods on which counterfeits of or imitations of trade-marks have been used, or who keeps them for the purpose of transmitting or selling.

(6) A person who imports, for the purpose of transmitting or selling, goods on which a mark has been used which is identical with or similar to the registered mark of another person, or who transmits or sells such goods, or who keeps them for the purposes of transmitting or selling them.

(7) A person who manufactures, transmits, sells, or keeps the necessary implements for the purpose of counterfeiting or imitating the registered trade-mark of another person.

(8) A person who, in connection with identical goods, uses a mark identical with or similar to the registered trade-mark of another person on commercial advertisements, notice boards, handbills, price lists, or other mercantile documents.

The institution of criminal proceedings shall be awaited before cognizance is taken of any offense mentioned in the preceding clause.

ART. 24. Persons who come under any one of the following subheadings shall be punished with penal servitude for a period not exceeding three years, or with a fine not exceeding 300 yen:

(1) A person who obtains registration of a trade-mark by a fraudulent act.

(2) A person who marks as registered an unregistered trade-mark, or who puts a deceptive mark upon it. A person who uses such a mark upon goods, or who transmits or sells such goods, or who keeps them for the purpose of transmitting or selling.

(3) A person who, without obtaining registration, uses in an advertisement, signboard, or handbill, etc., a trade-mark which is marked as registered, or to which a deceptive mark which suggests that it has been registered is applied.

PATENT LAW.—Article 93, section 2, of the Patent Law No. 23 of April 2, 1909,[1] relates to the use of fraudulent or deceptive marks in connection with patents.

ART. 93. Persons who come under any one of the following subheadings shall be punished with penal servitude for a period not exceeding three years, or with a fine not exceeding 500 yen:

(1) A person who obtains a patent by a fraudulent act.

(2) A person who marks a thing which is not patented or the vessel or wrapper that contains it as though it were patented, or who puts a deceptive mark upon it, or who sells or circulates such falsely marked things.

(3) A person who, for the purpose of sale or circulation of a thing or process which is not patented, or for the purpose of causing the use of a process which is not patented, makes it appear in an advertisement, signboard, or handbill that the thing or process is patented, or puts a deceptive mark on it which would lead one to think that it was patented.

LAW OF DESIGNS.—Article 25 of the Law of Designs No. 24 of April 2, 1909,[2] relates to fraudulent or deceptive designs.

ART. 25. Persons who come under any one of the following subheadings shall be punished with penal servitude for a period not exceeding one year, or with a fine not exceeding 300 yen:

[1] Patent and Trade-Mark Review, Vol. VII, pp. 2801, 2813.
[2] Patent and Trade-Mark Review, Vol. VII, pp. 2837, 2840.

(1) A person who obtains registration of a design by a fraudulent act.

(2) A person who marks a thing to which a registered design has not been applied, or its receptacle or wrapper as though the design were registered, or who puts a deceptive mark on it, or who sells or circulates such falsely marked things.

(3) A person who, for the purpose of sale or distribution of a thing to which a registered design has not been applied, makes it appear in an advertisement, signboard, or handbill that a registered design has been applied to it, or puts any deceptive mark upon it which would lead one to think so.

Section 26. International agreements regarding unfair competition.

INTRODUCTORY.—The special laws regarding unfair competition of some countries, such as Germany, contain provisions regarding the rights of foreigners to the protection afforded. As a rule, however, this matter is settled by international agreement. The United States, for instance, has entered into conventions for the protection of industrial property with some 19 foreign countries. There are also various international agreements in existence, some official and some private, which provide uniform regulations for the protection of certain forms of industrial property. Most important of the public agreements is that of the "International Union for the Protection of Industrial Property."

INTERNATIONAL UNION FOR THE PROTECTION OF INDUSTRIAL PROPERTY.—As early as 1873 the International Patent Congress in Vienna proposed an international agreement for the uniform legal protection of patents.[1] The International Congress for the Protection of Industrial Property at Paris, in 1878, concurred in this plan, and the movement finally culminated in 1883 in the organization of the "International Union for the Protection of Industrial Property" at Paris.

The Paris agreement of this union of March 20, 1883, together with the Madrid protocol of April 15, 1891, were revised and modified at Brussels on December 4, 1900, and signed at Washington on June 2, 1911, by the following members of the Union: Germany, Austria, Hungary, Belgium, United States of Brazil, Cuba, Denmark, Dominican Republic, Spain, United States of America, France, Great Britain, Italy, Japan, United States of Mexico, Norway, Netherlands, Republic of Portugal, Servia, Sweden, Switzerland, and Tunis.

Articles 2 and 10bis of this agreement,[2] which provide for the suppression of unfair competition, are as follows:

ART. 2. The subjects or citizens of each of the contracting countries shall enjoy, in all other countries of the Union, with regard to patents of invention, models of utility, industrial designs or models, trade-marks, trade names, the statements of place of origin, suppression of unfair competition, the advantages

[1] Osterrieth und Axster "Die Pariser Konvention," Berlin, 1903, p. IX.

[2] Convention between the United States and other Powers for the protection of industrial property; Treaty Series No. 579, Washington, 1913.

which the respective laws now grant or may hereafter grant to the citizens of that country. Consequently, they shall have the same protection as the latter and the same legal remedies against any infringements of their rights, provided they comply with the formalities and requirements imposed by the National laws of each State upon its own citizens. Any obligation of domicile or of establishment in the country where the protection is claimed shall not be imposed on the members of the Union.

ART. 10bis. All the contracting countries agree to assure to the members of the union an effective protection against unfair competition.

Article 6 of this agreement provides that trade-marks which are admitted to registry in the country of origin shall be admitted to registration and protected by all of the members of the Union unless (1) they infringe the rights of third parties in the country where protection is sought, (2) are not distinctive in the language or custom of the country where protection is sought, or (3) are contrary to morals or public order.

According to article 8 trade names are protected in all the countries of the union without the obligation of filing.

Article 9 provides that any product bearing illegally a trade-mark or trade name is prohibited from importation and shall be seized or otherwise disposed of by the country of importation.

Article 10 relating to false indications of origin is as follows:

ART. 10. The provisions of the preceding article shall be applicable to any product bearing falsely, as indication of place of production, the name of a definite locality, when this indication shall be joined to a fictitious or borrowed trade name with an intention to defraud.

As interested party is considered any producer, manufacturer, or merchant, engaged in the production, manufacture or commerce of such product, and established either in the locality falsely indicated as place of production or in the region where this locality is situated.

In the final protocol it was agreed that "the words 'propriété industrielle' (industrial property) should be taken in their broadest acceptation"; they extend to all production in the domain of agricultural industries (wines, grains, fruits, animals, etc.), and extractives (minerals, mineral water, etc.)."

At the Washington congress the Belgian delegate made the explicit reservation with regard to article 10bis that those countries which do not have a special law for the suppression of unfair competition shall not be obliged to enact any.

Great Britain desired that the Union should add the following clause to article 10bis:

The term "unfair competition" shall extend especially to the affixing to merchandise or products, conjointly or not with a trade-mark, of figures, words, or other indications calculated to make one believe or suppose that they come from a person other than he who has actually produced or sold them.

This amendment was not adopted, however, by the union on account of the objection of the Austrian delegate, whose instructions

did not allow the acceptance of any special agreement which would anticipate the legislation in course of enactment by his Government.[1]

Regarding the rights of foreigners, section 28[2] of the German unfair competition law of 1909 provides:

> Whoever does not possess a principal place of business within the country has a claim to the protection of this law only in so far as in the State in which his principal place of business is found. German manufacturers enjoy a corresponding protection, according to an announcement contained in the Imperial Gazette.

However, this section no longer applies to the members of the Paris Union, since the adoption of article 10bis.

The German courts have repeatedly upheld article 10bis of the Paris Convention as amended at Brussels.

In the case of the Eagle Oil Co. of New York *v.* Vacuum Oil Co., the Imperial Court[3] considered the question: Whether a stock company, which is located and has its main office in the United States, may invoke the protection of the German unfair competition law of May 27, 1896, even if it maintains no branch establishment in the German Empire. The court held as follows: According to article 10bis of the Paris Convention, together with the Brussels amendment of December 14, 1900, all contracting parties enjoy the protection against unfair competition which exists in each of the individual States. As regards Germany it must be taken into account also that section 16 of the unfair competition law of 1896 (sec. 28 of the law of 1909), requiring a main establishment, was drafted mainly from the viewpoint of reciprocity, and that therefore its maintenance is irreconcilable with the purpose of article 10bis. Henceforth, a German whose main establishment is not located in the German Empire, but in one of the other States belonging to the Paris Union, may also invoke the protection of the unfair competition law in Germany, which he was unable to do before. The appellate court has rightfully held that, according to article 10bis of the Paris Convention, the plaintiff, a stock company whose establishment is located in the United States of America, enjoys in Germany the protection of the unfair competition law, even if it has no branch establishment in the German Empire.

In a case where a British concern brought suit against a German company for infringing upon the trade name "Liebig," to which the former claimed the exclusive right of use, the Imperial Court held that, since the British concern had been denied the exclusive use by the courts of its own country on the grounds that the name in dispute had become a matter of public ownership, no grounds for an action existed in a German court.[4]

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[1] "Actes de la Conference réunie à Washington," Berne, 1911, p. 305.

[2] Section 16 of the law of 1896.

[3] Urt. v. 3. März 1905; Entsch. d. Reichsgerichts in Zivilsachen, 1905, Bd. 60, S. 217 fol.

[4] Urt. v. 13. Nov. 1897; Entsch. d. Reichsgerichts in Civilsachen, Bd. 40, 1898, S. 61. See also ibid., Bd. 46, S. 125.

In the case of an Austrian merchant, whose place of business was located in Austria, and who brought suit against a German competitor for unfair acts of competition committed in Berlin, the Imperial Court decided that since Austria had become a member of the Paris Union the German unfair competition law of 1909, as well as the German Civil Code, were applicable to the case at issue, and that to Austrian citizens the same rights were accorded as to citizens of the German Empire.[1]

INTERNATIONAL AGREEMENT FOR THE PREVENTION OF FALSE INDICATION OF ORIGIN ON GOODS.—On April 14, 1891, an international agreement for the prevention of false indications of origin on goods was entered into at Madrid and revised at Washington June 2, 1911, by the following countries: Brazil, Cuba, Spain, France, Great Britain, Portugal, Switzerland, and Tunis.[2] This agreement contains the following provisions:

ART. 1. All goods bearing a false indication of origin in which one of the Contracting Countries, or a place situated therein, shall be directly or indirectly indicated as being the country or place of origin, shall be seized on importation into any of the said countries.

The seizure shall also take place either in the country where the false indication of origin has been applied, or in that into which the goods bearing the false indication may have been imported.

If the law of any country does not permit seizure on importation, such seizure shall be replaced by prohibition of importation.

If the law of any country does not permit seizure in the interior, such seizure shall be replaced by the remedies assured in such case to natives by the law of such country.

ART. 2. The seizure shall take place at the request either of the proper Government Department or of any competent authority, such, for example, as the Customs Administration or of an interested party, whether individual or society, in conformity with the domestic law of each country.

The authorities are not bound to effect the seizure of goods in transit.

ART. 3. The present stipulations are not intended to prevent the vendor from indicating his name or address upon goods coming from a country other than where the sale takes place; but in such case the address or the name must be accompanied by a clear indication in legible characters of the country or place of manufacture or production.

ART. 4. The Tribunals of each country will decide what appellations, on account of their generic character, do not fall within the provisions of the present Arrangement, regional appellations concerning the origin of products of the vine being, however, not comprised in the reserve specified by the present article.

INTERNATIONAL AGREEMENT REGARDING THE REGISTRATION OF TRADEMARKS.—An international agreement for the registration of trade-

[1] Reichsgericht, Urt. v. 16. Mai, 1911; Zeitschrift für Internat. Recht., Bd. 23, 1913. S. 350.

[2] Papers and Correspondence relative to the Recent Conference at Washington for the revision of the International Convention for the Protection of Industrial Property and the Arrangement for the Prevention of False Indications of Origin on Goods, London, 1912, p. 114.

marks was established at Madrid, April 14, 1891.[1] It was revised at Brussels December 14, 1900, and at Washington June 2, 1911.

The following countries are parties to this agreement: Austria, Hungary, Belgium, Brazil, Cuba, Spain, France, Italy, Mexico, Holland, Portugal, Switzerland, and Tunis. Articles 1 and 4 are of special interest.

ART. 1. The subjects or citizens of each of the contracting countries may secure protection for their trade-marks of industry or commerce, providing they have been admitted for registry in the country of origin, in all the other countries by registering said marks with the international bureau at Berne through the agency of the country of origin.

ART. 4. Upon the registration of the mark at the international bureau being made, the protection of the mark in each of the contracting countries will be the same as if said marks had been directly registered there. * * *

ASSOCIATION FOR CREATING A WORLD TRADE-MARK.—On October 8, 1911, the Association for Creating a World Trade-Mark (Gesellschaft für Weltmarkenrecht) was organized at Berlin, with cooperating branches in 19 countries. The purpose of this association is to create a uniform trade-mark law which will be recognized and afford protection in all parts of the world.[2]

BERNE AGREEMENT FOR THE PROTECTION OF WORKS OF LITERATURE AND ART.—An international agreement for the protection of works of literature and art was established at Berne on September 9, 1886, and amended at Paris, May 4, 1896, and on November 13, 1908. The following countries were parties to this agreement: Belgium; Denmark, with its colonies; Germany; France, with its colonies; Great Britain, with its colonies and possessions; Italy; Japan; Liberia; Luxemburg; Monaco; Norway; Sweden; Switzerland; Spain, with its colonies; Tunis; and Portugal, with its colonies.[3]

According to articles 1 and 2, the contracting countries constitute a league for protecting the copyright of works of literature, art, and science, including books, brochures, and other literary works, dramatic, musical, choreographic, and pantomime productions. To authors who are citizens of one of those countries such protection is guaranteed in all the other countries except the country of origin of the works, as the respective laws grant to domestic authors or shall grant in the future, as well as the rights especially stipulated in this agreement (art. 4). Protection is granted not only for nonpublished works, but also for works published for the first time in one of the countries belonging to the league.

MIDDLE-EUROPEAN ECONOMIC ASSOCIATION.—The Middle-European Economic Association, formed by the delegates from Germany, Austria, Hungary, and Belgium, at its seventh conference in Brussels,

[1] Arrangement de Madrid pour l'enregistrement international des marques.

[2] Markenschutz und Wettbewerb, Bd. XI., pp. 28, 120.

[3] Katz; Textausgabe der gesamten deutschen Gesetzgebung und der internationalen und Sonderverträge des deutschen Reiches auf dem Gebiete des Patent, Muster und Zeichenwesens und des Urheberrechts. Berlin, 1912, S. 198.

April, 1912,[1] and its eighth conference at Budapest January, 1914, discussed and formulated plans for simplifying and making more uniform the laws relating to unfair competition in the countries comprising this association. At the Budapest meeting it was recommended by several delegates that the Governments of the different States represented enact uniform legislation for the suppression of such unfair practices of competition, as false advertisements regarding quantity and quality, misappropriation and misuse of distinguishing marks for the purpose of enticing customers, disparaging competitors, betrayal or other violation of trust or spying out of business and trade secrets and fraudulent clearance sales.

In addition to this casuistic enumeration of certain practices of unfair competition, the adoption of a supplementary general clause was also recommended which would enable the courts to reach other practices of unfair competition that are grossly repugnant to good morals.[2]

SIXTH INTERNATIONAL CONGRESS OF CHAMBERS OF COMMERCE AND COMMERCIAL AND INDUSTRIAL ASSOCIATIONS.—At the Sixth International Congress of Chambers of Commerce and of Commercial and Industrial Associations at Paris, June, 1914, one of the leading subjects on the program was "The advisability of international action against unfair competition in the sense of the existing laws." Several special reports on this subject were embodied in the proceedings of the special committee on unfair competition.

The "Association des Anciens Élèves de l'École des Hautes Études Commerciales," in a special report submitted by it, proposed that the congress should inaugurate an international action for the suppression of unfair competition on the basis of the following program:

1. Legislation:
   - (*a*) The general adoption internationally of the French system of article 1382 of the Civil Code.
   - (*b*) Recognition of unfair competition in all countries as a penal offense, in order to permit the public ministry to initiate action.
2. Procedure:

   Installation at Berne of a service for the suppression of unfair competition, whose duty it shall be (*a*) to furnish information to merchants regarding everything that relates to bringing suit in any tribunal of a country signatory to the conventions of Paris, Brussels, and Washington; (*b*) to notify the public ministry, that has jurisdiction, of cases of unfair competition.[3]

[1] Verhandlungen der Mitteleuropäischen Wirtschafts-Konferenz in Brüssel, 1912, p. 289; Budapest, 1914, pp. 39, 301.

[2] Pester Lloyd, Jan. 4, 1914.

[3] Rapport présenté au nom de l'Association des Anciens Élèves de l'École des Hautes Études Commerciales, par M. Depulchault, Liége, 1914.

The subcommittee on unfair competition in its report recommended [1] that every nation should make an effort to render efficacious the resolutions of the Washington convention and proposed that the congress should restrict itself to one special phase of unfair competition, viz, corruption and corruptive practices, which affect not only the countries where they are carried on, but international commerce equally, and therefore require international intervention for their suppression.

The subcommittee submitted resolutions to the effect that (1) the congress should name a special committee to study the different phases of unfair competition which require legislative intervention; (2) the congress should insist upon the necessity of special legislation, as uniform as possible, in all countries for the suppression of corruption. It recommended further that prohibited acts should be made punishable as a crime by the penal code of each country, but that civil prosecution should be allowed, which would enable the victims of bribery to procure compensation for injuries sustained. The congress held that such special legislation should facilitate the prosecution of corrupt practices and should confer the right of initiative not only upon the public ministry, but also upon associations and individuals.[2]

FOURTH INTERNATIONAL AMERICAN CONFERENCE AT BUENOS AIRES.—At the Fourth International American Conference at Buenos Aires, June 9 to August 30, 1910, the following three conventions relating to industrial property were entered into, subject to ratification by the proper authorities of the countries represented, viz, United States of America, Argentina, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Salvador, Uruguay, and Venezuela:[3]

(1) The convention relating to inventions, patents, designs, and industrial models. This convention was signed by the President of the United States on July 29, 1914.[4] Article IX relates to liability incurred for injuring the rights of inventors.

ART. IX. Persons who incur civil or criminal liabilities, because of injuries or damage to the rights of inventors, shall be prosecuted and punished in accordance with the laws of the countries wherein the offense has been committed or the damage occasioned.

(2) The convention relating to protection of trade-marks of August 20, 1910. Article VIII of this convention relates to falsifica-

[1] Sous-Comité de la concurrence déloyale, Rapport.
[2] Rapport, pp. 7–8.
[3] Patent and Trade-Mark Review, Vol. IX, p. 3442, fol.
[4] Patent and Trade-Mark Review, Vol. XII, p. 367.

tion or unauthorized use of a trade-mark, and Article X to the protection of commercial names. These articles are as follows:

ART. VIII. The falsification, imitation, or unauthorized use of a trade-mark, as also the false representation as to the origin of a product, shall be prosecuted by the interested party in accordance with the laws of the State wherein the offense is committed.

For the effects of this article, interested parties shall be understood to be any producer, manufacturer, or merchant engaged in the production, manufacture, or traffic of said product, or in the case of false representation of origin, one doing business in the locality falsely indicated as that of origin, or in the territory in which said locality is situated.

ART. X. Commercal names shall be protected in all the States of the Union, without deposit or registration, whether the same form part of a trade-mark or not.

Articles XI to XVI provide for the establishment of two international bureaus, one at Habana, Cuba, to have charge of the registration of trade-marks coming from the countries of North and Central America, and the other at Rio de Janeiro to have charge of the registration of trade-marks from the South American countries.

According to Article XVI, the Republic of Cuba and of the United States of Brazil shall proceed with the organization of these bureaus upon the ratification of the convention by at least two-thirds of each group. The Patent and Trade-Mark Review for May, 1913,[1] states that six States had at that time ratified the convention, all belonging to the northern group. As soon as two more States ratified the convention the Government of Cuba could proceed to the organization of the bureau.

(3) The convention relating to literary and artistic copyright of August 11, 1910. This convention was signed by the President of the United States on July 13, 1914.[2]

[1] Patent and Trade-Mark Review, Vol. XI, p. 228.
[2] Patent and Trade-Mark Review, Vol. XII, p. 329.

CHAPTER XI.

ACTIVITIES OF TRADE ASSOCIATIONS AND THEIR RELATION TO LAWS CONCERNING COMPETITION.

Section 1. Introductory.

The remarkable growth of trade associations makes this form of cooperation of especial importance in the consideration of legislation against restraint of trade and unfair competition. A trade association is an efficient means by which those engaged independently in a particular line of trade may redress wrongs and improve conditions through collective action. It is capable of symbolizing the highest ideals in trade, or of expressing that which invites the odium of public censure and legal penalty. Directed within legal limits and along proper lines, it may accomplish much good, but, if ostensibly formed for a legitimate purpose, when in reality designed to accomplish illegal or questionable ends, it will result in much harm. To cover all of the conditions under which trade associations would be beneficial, or to point out the line of demarcation between combinations of circumstances under which they would or would not be legal, is beyond the scope and intent of this chapter, which, in its first part, is limited to brief descriptions of the purposes and activities of trade associations as indicated by their constitutions, by-laws, and similar published public material, and in its second part, to a brief treatment of selected cases wherein the activities of trade associations have been judicially questioned. These cases are arranged so as to show chiefly the classes of association activities which have formed the basis of legal action.

GENERAL CHARACTER AND PURPOSE OF TRADE ASSOCIATIONS.

Section 2. Classification of trade associations.

As employed in this chapter the term "trade associations" comprises associations of manufacturers, dealers (wholesale or retail), and producers of raw materials, such as mining companies and agricultural enterprises, in so far as their activities relate to the promotion of the commercial aspects of the business.[1] Occasionally a

[1] Boards of trade, chambers of commerce, and similar general promotive organizations have been omitted, as not bearing sufficiently upon particular industries; also, most of the general manufacturers' associations, except the National Association of Manufacturers and the National Federation of Retail Merchants. Labor unions have been omitted; also associations of professional men and purely technical societies, unless their work is part of the activity of an association clearly industrial in character.

mixed association includes both manufacturers and dealers in the same industry or in related industries.

Associations may be further classed into local, State, and interstate or national. The few associations which are international in their scope are classed here with interstate and national associations.

The members of some of these associations are individual business concerns; others, particularly those of national scope, have as members other associations. The National Federation of Implement and Vehicle Dealers' Associations, for instance, is composed of delegates from State and interstate associations of implement and vehicle dealers.

Section 3. Association activities looking toward general promotion of the industry.

The first and most general object of most trade associations, as stated in their by-laws or constitutions, is to advance the general prosperity of the industry. "This association," says one, "is formed for the purpose of promoting the welfare of the flour millers of the United States." Another aims, among other things, "to promote fellowship among members and advance the welfare of trade and commerce." The objects of an association of retail jewelers are "to unite the retail jewelers of the State in a sentiment promotive of the highest welfare of the trade; to cause the elimination of unmercantile methods and practices; to encourage the supremacy of standards of truth and honesty in all jewelry and related products; and in general to promote measures calculated to redound to the material and moral advantage of retail jewelers."

In actual practice, the advancement of the general welfare of the industry has been interpreted to cover a wide field of activities, from promoting the widest use of the product to "safeguarding legitimate profit" in various ways.

Section 4. Publicity of product—Cooperative advertising.

A variety of methods have been adopted by associations with a view to increasing the demand for and consumption of the goods produced or handled by their members. The principal method has been the use of extensive general advertising. Many associations have made heavy appropriations and engaged in campaigns intended to acquaint the public with the quality and usefulness of their members' goods. Others have given their attention to educating their members in the most successful methods of local advertising. Advertising experts and agencies are employed to make the best possible presentation of the subject. Some associations publish books and pamphlets or issue regular publications extolling the merits of their product. Cooperative advertising for securing pub-

licity of product has not been confined to commodities of a special and unusual nature, but has also been applied to staple articles. This has been due partly to the competition of substitutes for these staple articles. Some associations provide for public exhibitions and demonstrations of their products, and others adopt labels, seals, and designs, for the purpose of identifying and popularizing their goods. There is a movement among some associations to adopt a trade-mark as the basis of still more extensive advertising.

Section 5. Price control.

The primary purpose of the more elaborate associations of manufacturers is, of course, to increase profits. In former days the purpose to maintain prices was expressly avowed in their constitutions, and carried out through formal agreements, with penalties for violation. Often the agreements limited production instead of directly fixing prices; the purpose and the general effect were the same. Agreements on prices or output are not now reduced to such formal character, because of the increasingly stringent condemnation of them by the law, and, if they exist, are of a surreptitious character. For the same reason the avowal of the purpose to sustain prices or limit output has been eliminated from the association constitutions. In many constitutions a formal disavowal of any such purpose has been inserted instead.

Section 6. Fixing the channels of trade; opposition to "direct selling"; the "irregular" dealer.

There is a group of practices complained of by merchants, chiefly by retailers, and consisting of methods of distribution which the merchants adversely affected regard as "irregular" and therefore illegitimate. They include selling by manufacturers and jobbers directly to consumers; selling by mail-order houses; selling by cooperative stores; selling of any sort of goods by persons not regularly engaged in selling them or not maintaining a fixed and permanent business place; and sales by an established retailer outside of territory which is conceived as his. The restriction of any of these forms of competition may be described as fixing the channels of trade. Even the opposition to price cutting may be so described when it takes the form of efforts to cut off the supply of goods from price cutters. In various lines, including groceries, lumber, and coal, the retailers have made strenuous efforts through association activity to confine trade to "legitimate" channels. The usual method is to shut off supplies—sometimes by boycotting manufacturers and wholesalers who sell to persons not recognized as "regular" dealers.

Section 7. Uniform terms.

One of the purposes oftenest announced in the preambles of association constitutions is "to produce uniformity and certainty in the customs and usages of the trade." Among the trade terms for which the need of definition is earliest felt are the designations of kinds and grades of the commodities dealt in. In respect to terms of sale, the associations whose members sell in wholesale quantities try to establish uniformity and certainty by defining trade terms, by prescribing or suggesting the ways in which sales shall be made and confirmed, by restricting cancellation of orders, by limiting the permissible postponement of shipment, by prescribing the manner and terms of payment, etc. Sometimes the uniformity and certainty that are sought concern not so much normal terms of sale as adherence to such terms.

A point in which nominal uniformity, at least, establishes itself almost automatically in each trade is the customary length of credit and the discount for cash. Here, therefore, the efforts of the associations are directed to the enforcement of the usual terms, and to shortening the credit and diminishing the discount.

Section 8. Marketing and other cooperative associations.

Somewhat different from other trade associations have been the marketing and other cooperative organizations which have been formed from time to time. Such success as the cooperative associations have had in the United States has been largely among farmers. Several ambitious plans of national scope have been formed, and have to some extent succeeded. Successes quite as great have grown out of local movements, started without thought of extension.

To the former class belong the Patrons of Husbandry, the Ancient Order of Gleaners, and the American Society of Equity. To the latter belong the farmers' elevator companies. These elevator companies, which exist to the number of 1,500 or more, and are scattered all through the grain-growing States, were brought into existence by the methods of the grain business as handled through the large commission companies in Chicago. These commission companies established strings of local elevators throughout the grain States and "froze" out the independent elevator man by overbidding him for a time, after which they paid the farmer whatever they pleased for his grain.

There are several very important cooperative-marketing organizations among fruit growers, especially in California.

Many of the cooperative-selling societies buy supplies also for their members. There are also associations exclusively for joint buying; for instance, among bakers.

Section 9. Standardizing materials, processes, or products.

This is a matter in which many associations have greatly interested themselves. Sometimes such standardization is subsidiary to efforts for uniformity of prices, but this is by no means always so. Drug associations, for instance, have interested themselves in standardization of drugs; millers in grading of grain and flour; printers in standard sizes and weights of paper; and textile manufacturers in standardization of colors.

Section 10. Standard cost accounting.

Associations have been active in educating their members as to their cost of doing business, sometimes with a view to inducing them to charge higher or more uniform prices. "When our association was organized four years ago," said the president of an association in a convention address, "one of the first problems we had to contend with was the low prices at which goods were being sold. It has often been said that the only way to remedy this evil was to let the price cutter really know the cost of his goods. Our association found the surest and best plan to accomplish this was to secure a cost expert to get us all to figure our costs on the same basis and by the same method."

Section 11. Improving processes or product; technical activities.

Many associations have attempted to improve their product, and also to simplify their processes of manufacture, frequently for the purpose of improving the product, sometimes in order to lessen the cost of production. Technical improvements of processes and products have therefore been the subject of active discussion. Indeed, there are associations whose meetings are devoted more to technical than to business questions. Several associations in the metal industries have largely a technical character. Several connected with food production have given much attention to improvement of quality.

Section 12. Credit bureaus.

One of the main activities of a number of trade associations is the supplying of credit ratings. In a number of instances it is set forth as one of the purposes of the organization.

Information on credit conditions is usually collected through a credit bureau or credit department connected with the secretary's office. In some instances national associations maintain credit bureaus merely for the purpose of establishing credit departments in the local associations and standardizing sets of credit-system blanks to facilitate the exchange of credit information, but the most important and effective ones are maintained primarily by the national associations.

The information collected by these credit bureaus is in most cases the result of an exchange of actual "ledger experiences." The members of the association make reports to the secretary, showing how bills are paid, amounts overdue, etc. In some cases the constitution or by-laws make it the duty of members to report such information. In most cases there is no penalty for failing to supply such information, but only the members who supply the information are entitled to receive it.

In many instances the secretary prepares a list of "delinquent" or "questionable" concerns at regular intervals, and mails it to the members, sometimes giving the names of members furnishing the information, but oftener merely requesting members to correspond with the secretary's office before dealing with such concerns. Several important associations publish regular credit-rating books.

Section 13. Collection agencies.

A few trade associations undertake to collect debts for their members. In one instance collections seem to be the main activity of the organization, while in others it is stated to be one of the purposes for which the association was organized. Collections are made by both local and national associations. In some cases the collection department is maintained in connection with the credit information department. The volume of business done by some of the collection bureaus is large.

A few associations maintain bureaus of bankruptcy in addition to the collection bureaus, whose duty is to handle bankruptcy cases in which members are interested.

Section 14. Traffic matters.

One of the main activities of trade associations is taking care of their members in matters growing out of their relations with the transportation companies. This is usually done through an organized department of the association, variously called "committee on freight rates," "transportation committee," "traffic committee," "railroad department," or some similar name. An incidental work in this connection is keeping members informed as to traffic regulations; but the important work of associations in regard to traffic matters is representing the interest of their members in such matters as traffic regulations; freight rates, including classifications; bills of lading; adjustment and collection of claims; and, in few instances, express rates and telephone and telegraph matters.

A most important part of the work of the traffic department of the trade association is obtaining favorable freight rates for its members. Occasional action is taken to secure lower rates, but they are con-

tinually on the defensive trying to prevent an increase of existing rates. The famous "5 per cent increase" recently granted the eastern railroads by the Interstate Commerce Commission was vigorously opposed by the trade associations throughout the country. A proposed increase in the minimum carload of certain commodities is opposed by associations whose members are affected by such changes, for the reason that it would tend to increase the number of less-than-carload shipments of such commodities at higher rates. Some articles packed in uniform packages have an accepted weight per unit, and trade associations oppose any attempt of the railroads to increase this weight. A common way of increasing rates is by transferring articles from a lower to a higher class. When such change is proposed the shippers of the article in question may file protests and attend the hearings, first before the classification committee through which the change is proposed and then before the Interstate Commerce Commission.

Some activity is shown among associations in the matter of securing favorable express rates and telephone and telegraph regulations. Some associations have worked to induce railroads to construct suitable cars and to keep shippers better supplied with cars.

Bills of lading are receiving considerable attention from trade associations. They are seeking to secure the passage of a national law under which a uniform bill of lading may be framed.

A great many trade associations undertake to collect claims against carriers for their members, for overcharge, loss, damage, demurrage, shortage, etc. With many this is one of the main activities.

Section 15. Labor matters.

There are associations formed to fight labor unions, which will not even admit an employer who has any individual agreement with a labor union; associations that spend or have spent most of their energy on labor matters, but some in other directions; associations that are concerned with labor questions incidentally; and associations that are not concerned with such questions at all. Labor matters are of comparatively little direct importance to merchants and are therefore unlikely to be taken up by mercantile associations. They are of primary importance to manufacturers and mine operators, and are apt to get much attention from associations in such lines.

The closest relations between employers' associations and labor unions are represented by the formal agreements between them, fixing wages and hours and other conditions, and usually running for a fixed time. Such agreements have been maintained for many years by several associations of bituminous coal-mine operators. They

exist locally in several branches of the clothing trade. Somewhat similar conditions exist in the building trades of many of the larger cities.

Section 16. Employment bureaus and clearance cards.

Partly for convenience in securing help in the ordinary course of business and partly as an aid in breaking strikes, many employers' associations maintain employment offices. A system of clearance cards, involving refusal of employment to anyone who has not a card from his last employer, may be used with or without an employment bureau. It is obvious that such a system may perform the function of a very effective black list.

Section 17. Apprenticeship and trade education.

Employers in the more skilled trades are troubled by the lack of skilled workmen, a lack which seems to result from the difficulty of training apprentices—perhaps rather from the fact that it does not pay to train them—under modern conditions. Under these circumstances some associations have taken steps to substitute school for shop teaching.

Section 18. Legislative activities.

The range of legislative questions in which one association or another is interested is very wide. Among the topics on which trade associations have promoted or opposed legislation in recent years are the following: The tariff; resale price maintenance; cotton exchanges; purity of textile materials or statement by label of materials of textiles; Federal horsepower tax on automobiles; Federal tax on gasoline; mixed flour; Federal tax on grain sales on exchanges; Federal tax on mail-order houses; various amendments of the trust laws, including exemption of labor and agricultural associations therefrom; Federal tax on patent or proprietary medicines; antinarcotic legislation; special precautionary methods of packing poisons; parcel post; pure-food and drug laws; Federal registration of motor vehicles; Federal grading of cotton and of grain; cold storage; patents; trade-marks; copyrights; bankruptcy; forest conservation; liquor traffic; labor laws, including workmen's compensation, convict labor, and eight-hour day.

Various associations have indorsed proposals for legalizing by statute the maintenance of resale prices; that is, the authoritative fixing by a seller of the price at which his customer shall sell again. The National Drug Trade Conference and the National Association of Retail Druggists have given considerable attention to this subject. As long ago as the late eighties and early nineties, the dealers

in grain binders were seeking the support of manufacturers and wholesalers in the establishment and maintenance of resale prices. In 1915 the Western Association of Implement and Vehicle Dealers indorsed the Stevens bill[1] giving manufacturers the right to fix resale prices.

The nature of many articles handled by the stationery trade and the fact that the manufacturers are members of the National Association of Stationers and Manufacturers has made for a more or less general adoption of a policy calculated to fix resale prices. This policy has been greatly strengthened by the cooperation and support of the association's price committees covering the various classes of goods, and by agitation and discussion at the annual conventions. It seems fairly clear that in a number of cases at least, the initiative in forming such a policy rested with the retailers.

Section 19. Supplying insurance to members.

Many of the trade associations interest themselves in the question of insurance. Heretofore this has been confined almost entirely to fire insurance, but the passing of employers' liability laws in many of the States has caused some associations to turn their attention to industrial indemnity insurance.

The reasons which have caused associations to take up the matter of insurance are twofold—the seeking of lower insurance costs, and the increasing of their membership by increasing their usefulness.

In their activities in this field the associations may be grouped under two heads, viz:

1. Those which seek mainly to lower the rates of the regular insurance companies.

2. Those which have established special methods of insurance for their members.

Most of the associations fall under the first group. Their work is generally carried on through committees or insurance departments and consists largely of education among the members in methods of reducing the fire risks by the use of safety appliances and the elimination of possible causes of fire. On account of such improvements the insurance companies are asked to reduce their rates in the particular industry. Some of the associations also seek to reduce the rates by acting as agents for particular companies in securing the insurance of their members, thus eliminating for the insurance companies the usual cost of securing business.

The more important work in the insurance field is performed by those associations which fall under the second group. This includes not only those associations which have established their own insurance companies, but those which subscribe to the insurance companies

[1] H. R. 13305, 63d Cong.

of other associations. There are a considerable number of such companies. They have saved their members large amounts which would otherwise have gone for the expenses and profits of regular companies, and some of them have also greatly reduced the fire loss and the fire hazard of their members by investigation and education.

Section 20. Foreign trade.

Some associations have given considerable attention to the matter of foreign trade. Many have made it the subject of discussion at their conventions, and some have appointed permanent committees to deal with the questions arising in connection therewith. A number of associations have recognized the importance of obtaining the assistance of the Government in extending the foreign trade of their members. Information based on the Government's consular reports is distributed by some associations.

Section 21. Publications.

The associations publish a variety of material. Some of the smaller associations limit their publications to letters sent to members, weekly or monthly or without regular time of issue. Many publish occasional bulletins, reports, or circulars on topics of interest to their members. A number of the associations publish books, such as yearbooks, rating books, records of proceedings, and the like. Many, especially of the larger, publish weekly, monthly, or quarterly magazines or bulletins as their official organs. Others merely adopt some current publication as their official organ.

JUDICIAL ATTITUDE TOWARD ACTIVITIES OF TRADE ASSOCIATIONS AFFECTING COMPETITION.

Trade associations, from the legal point of view, are subject to the same restrictions and limitations imposed on individuals, with the additional limitation that "an act harmless when done by one person may become a public wrong when done by many acting in concert in pursuance of a conspiracy."[1]

Trade associations, being nothing more than combinations of individuals, firms, or corporations, engaged in a particular line of trade and acting usually under some kind of formal organization, are not of themselves obnoxious to the law. There are, in fact, many worthy and legitimate purposes for which such associations may be formed; for example, protection against insolvent debtors, prevention of dishonest practices, publication of statistical data, social intercourse, etc.; but no matter how innocent the purpose, or how plausible the profession of good faith, if its actions result in restraining the legal

[1] Grenada Lumber Co. *v.* Mississippi, 217 U. S., 433 (1910); Eastern States Lumber Dealers' Association *v.* United States, 224 U. S., 600 (1914).

rights of either comembers or others, such actions will be condemned by the courts.[1]

An interesting example of an association whose purpose was held to be legal, while certain of its acts were condemned, is found in United States *v.* Southern Wholesale Grocers' Association.[2] The purpose of this association, as stated in its constitution and by-laws, was the promotion of harmony between the members of the association and the manufacturers of food products, to the end

[1] A very interesting exposition of the law relating to cooperative effort is found in the following letter by an eminent member of the American bar:

[Letterhead of Lehmann & Lehmann, attorneys, St. Louis, Mo., Apr. 8, 1909.]

Mr. GEORGE K. SMITH,
St. Louis, Missouri.

DEAR SIR: I have given due consideration to the matters we talked about on Tuesday and have found no occasion to change the opinion then expressed.

You have the undoubted right to collect and distribute the fullest information you can get of what is being done in the lumber field, with all details as to the amount of production from day to day, the stock on hand, prices asked and received, etc., and every man who receives this information has the right to act upon it as he thinks proper. If he thinks more is being produced than can be sold, he can reduce the amount of his cutting or cease cutting altogether if he chooses, until conditions improve.

Beyond this, however, you can not go. There can be no agreement or understanding between two or more lumbermen to limit their production and therefore no course of conduct from which such an agreement or understanding could be inferred by a court or a jury.

If some man should go from one lumberman to another getting from each a statement or a promise that he would limit his output in the future and what each man thus said or promised was communicated to the others and if this were followed by a limitation of the output, a court or jury would be very likely to infer, despite all protestations to the contrary, that the limitation of output was the result of an agreement or understanding.

So, too, if one lumberman after another declares that he will hereafter curtail his production and they inform each other of this purpose and then they act in accordance with their declarations, a court or jury would be very likely to infer that this was all in pursuance of an agreement or understanding.

What is in fact being done, each and all have a right to know. This is no more than is done every day by the market reports in our daily newspapers. They show, for example, the daily receipts of grain and live stock, the prices received, information as to visible supply, etc., and farmers individually govern themselves accordingly. The man not pressed for money does not ship his grain or live stock to a glutted market. The lumberman may undoubtedly get like information as to his business and may determine his conduct by it.

But the action based upon this information must be individual and independent. If he concludes for himself that the market is overloaded and that he can not produce at a profit, he may curtail or cease producing altogether and for as long a time as he pleases, but if he concludes that he will continue as he is doing, unless his competitors will also curtail or cease production, and there is a curtailment or cessation as the result of any sort of preconcert, agreement or understanding, the law is violated.

The conditions of the trade, however bad; the price of lumber however low; the persistence of lumbermen in cutting an amount above the market demands; will not legalize an agreement among any number of them to limit the output of their commodity or to fix the price of it. The policy of the law is free competition and it plainly requires that each producer shall conduct his business independently of any compact with his competitors. This does not prohibit any producer from taking into account all the conditions of business in determining his own conduct, and it does not forbid cooperation for the purpose of obtaining information that is useful to each and to all.

I repeat, however, that beyond the collection and distribution of information as to what is being done, you can not go, and can not state too strongly that any agreement or understanding, no matter how indirect the means by which it is brought about, falls under the ban of the law.

Respectfully, yours,
F. W. LEHMANN.

[2] 207 Fed., 434 (1913).

that the wholesale grocers might be recognized as the economical channel of distribution of the products of the manufacturers. In a suit against the association to restrain alleged violations of the Sherman Antitrust Act, the decree, after enjoining certain acts, expressly provided that the association was not restrained from maintaining the organization for social or other purposes than those therein prohibited. It was further held that the addressing of legitimate argument to manufacturers to procure the abandonment by them of a certain policy and the continuance of another did not violate the Sherman Antitrust Act, nor a decree enjoining violations of that act.

In contrast to this case may be cited United States *v.* Jellico Mountain Coal Co.,[1] wherein the purposes of the association, in the opinion of the Federal Court, "could hardly have been more successfully framed to fall within the provisions of the Act of July 2, 1890 [Sherman Antitrust Act], had the objects been to organize a combination, the business of which should subject it to the penalties of that statute."

Consent decrees in suits brought under the Sherman Antitrust Act, namely, decrees in suits wherein defendants have submitted without contest to injunctions prayed for by the prosecution, have, in some instances, exceeded in scope injunctions granted in contested causes. Thus, the "Association of Coaster Brake Licensees," composed of owners of certain patent rights, some of whom also dealt in unpatented articles and all of whom acted under a number of uniform patent-license contracts fixing prices, was declared a combination in restraint of trade and an attempt to monopolize, etc. The decree, after enjoining certain acts (see p. 729), enjoined each of the defendants who had been members of, or who had a share in the business operations of said association from further maintaining the association, or thereafter creating, or participating in any manner whatsoever in, any other association or organization of similar character.[2]

An abuse of the proper functions of trade associations is found where they are formed ostensibly for legitimate purposes but used as a means for carrying out unlawful ends. Thus, for the purpose of supplying honest information, it is legal, at least under the Missouri antitrust statute, for trade associations to publish statistics giving actual bona fide sales of products and the prices thereof; but the Supreme Court of Missouri[3] has declared that such statistics ought

[1] 43 Fed., 898, and 46 Fed., 432 (1891).

[2] Consent decree, United States *v.* New Departure Mfg. Co.

Consent decrees affecting trade associations are treated herein rather as showing the attitude of the Government with respect to prosecutions under the Sherman Anti-trust Act than as binding legal precedent.

[3] State ex inf. Attorney General *v.* Arkansas Lumber Co. et al., 169 S. W., 145, 177; 262 Mo., 212 (1914).

to represent current prices based on actual sales or offers to sell or to buy, and "not to misrepresent such prices with a view of boosting any prices of any item or items."

Another instance of abuse is found in a Missouri case which condemned an association maintained ostensibly for social purposes but in reality used for the purpose of fixing fire insurance rates.[1]

A description of the variety of purposes for which trade associations might legally be formed, or the countless differences in the methods of attaining their ends, is not attempted, but some of the more important judicial decisions relating to associations having some degree of formal organization are summarized below, for the purpose of showing the judicial attitude toward trade association activities, the legality of which has been questioned. Probably the greatest number of these decisions treat of activities which have for their purpose (1) the controlling of prices by direct agreement or by the publication of price lists, or, in lines of business where conditions change with each transaction, such as contracting, by either refraining absolutely from submitting bids or by submitting them in such a manner that the contract will be awarded according to a prearranged plan; (2) the prevention of sales by manufacturers to consumers and to so-called "irregular dealers"; (3) the limitation of output; (4) the allotment of customers and the division of territory; and (5) the refusal to extend credit to delinquent debtors. The most usual means by which associations have sought to prevent direct and irregular sales is by boycotting, ordinarily effected through blacklisting or whitelisting, although other forms of coercion have been employed.

The decisions are treated chiefly according to the five purposes mentioned, because this arrangement lends itself more readily than a more formal legal arrangement of cases to the purposes of this part of the chapter, which is intended to describe (*a*) what purpose the association attempted to accomplish by the acts complained of; (*b*) what means it took to accomplish that purpose; and (*c*) what class of law, namely, common law, Federal statutes, or State statutes, was violated thereby.

Section 22. Price control.

As shown in the first part of this chapter, a primary purpose common to various classes of trade associations is to increase returns, usually through increased prices. Association activities having for their purpose the fixing of prices, whether the result is to increase or decrease them, have generally been judicially condemned under the common law and under State and Federal stat-

[1] State ex rel. Crow, Attorney General, *v.* Firemen's Fund Insurance Co., 52 S. W., 595; 152 Mo., 1 (1899).

utes. Thus the purposes of an association, composed of approximately 95 per cent of the manufacturers of candles located in a certain large section of the United States, organized to increase prices and decrease production, were held in Ohio to be contrary to public policy, and an action at law which would give effect to the articles of association could not be maintained.[1] A similar result was reached in Illinois, where it appeared that one, if not the leading, object of the Chicago Law Stenographers' Association was to control prices to be charged by its members, notwithstanding only a small portion of the total number of stenographers operating in Chicago were members of the association.[2] The following agreements were likewise condemned: An agreement among members of a brewers' association, prohibiting, among other things, the sale of beer to any new trade or to customers of any other member of the association at less than a stipulated price was held by the Supreme Court of Pennsylvania to be in restraint of trade, to tend to destroy competition and to create a monopoly in articles of daily consumption, and therefore void as against public policy;[3] an agreement between a retail druggists' association and certain corporations engaged in selling drugs and druggists' supplies, to maintain a maximum scale of prices and to prevent all vendors who are unwilling to maintain such prices from securing supplies was held unlawful in Maryland;[4] and an agreement between a jobbers' association, a retail grocers' association, and a retail merchants' association to prohibit, in substance, wholesalers from selling to any retail dealer in the State who refused to agree to sell to consumers at prices fixed by these associations, was declared unlawful by the Colorado Court of Appeals.[5]

Similar trade-association activities have violated various State antitrust laws as follows: The purpose of an association organized to fix the price and control and limit the quantity of milk shipped to Chicago was held to violate the Illinois statute;[6] the action of an association in fixing the price of coal and in distributing circulars showing the price so fixed[7] resulted in the successful prosecution of its members under the Illinois Criminal Code[8] and under the Illinois antitrust act;[9] a by-law fixing the minimum commission to be charged by members of an association of persons engaged in and practically controlling the business of buying and selling live stock

[1] Emery et al. *v.* The Ohio Candle Co., 47 Ohio St., 320 (1890).
[2] More et al. *v.* Bennett et al., 140 Ill., 69, 80 (1892).
[3] Nester et al *v.* Continental Brewing Co. et al., 161 Pa. St., 473 (1894).
[4] Klingel's Pharmacy *v.* Sharp & Dohme et al., 104 Md., 218 (1906).
[5] Denver Jobbers' Association et al. *v.* People ex rel. Dickson, Atty. Gen., 122 Pac., 405 (1912).
[6] Ford *v.* The Chicago Milk Shippers' Association, 155 Ill., 166 (1895). Cf. People *v.* Milk Exchange, 145 N. Y., 267 (1895).
[7] Chicago, Wilmington & Vermilion Coal Co. et al. *v.* People, 214 Ill., 421 (1905).
[8] Illinois Crim. Code, sec. 46, prohibiting conspiracies "to do any illegal act injurious to the public trade."
[9] Illinois Laws, 1891, p. 206.

for others was held to violate the Kansas antitrust law;[1] agreements between members of an association which included the majority of the master plumbers and all the wholesale dealers in plumbers' supplies in Detroit to fix both buying and selling prices, accompanied by discrimination against nonmembers, was held prohibited by the antitrust act of Michigan,[2] and testimony tending to prove that defendants had lowered prices was immaterial;[3] an agreement entered into for the purpose of limiting competition and raising and controlling the price of plumbers' supplies in St. Louis between a plumbers' association and certain manufacturers and dealers whereby the latter agreed not to sell to nonmembers and the former not to purchase from dealers found selling to nonmembers,[4] the activities of members of an underwriters' social club in maintaining fire insurance rates,[5] and attempts by members of a lumber manufacturers' association to influence the price of lumber were declared unlawful under the Missouri antitrust laws. In the last-mentioned case it appeared that the association (Yellow Pine Manufacturers' Association) had adopted a resolution stating it should not make any recommendations respecting prices to be charged for lumber. Price lists or market reports which showed great increases, however, had thereafter been issued by the secretary to members, who for various reasons did not faithfully abide thereby. The court observed that the price was constantly advancing, and that "while a rigid adherence to the price fixed was in the nature of things wellnigh impossible, yet the prices charged revolved about the prices fixed like planets in their orbits revolve about the sun." A writ of ouster was suspended on the condition, among others, that the respondents would in the future sell lumber in Missouri in open and honest competition with all other wholesale dealers; that they would not discriminate between buyers of lumber or retailers; that they would not be party to the publication or circulation of any price current, except such as gave honest information with respect to actual and bona fide sales of such products and the prices paid therefor, nor engage in any practices which would violate the letter or spirit of the antitrust laws of the State.[6] The attitude of the court toward the honest publication of bona fide price statistics is made plain in the decision of this case, which in part is as follows:

We are not to be understood as declaring as a matter of law, under our Missouri anti-trust statutes, that dealers or manufacturers of any vendible com-

[1] State *v.* Wilson, 73 Kans., 343 (1906).

[2] Michigan Public Acts, 1899, act No. 255.

[3] Hunt, Pros. Atty. of Wayne County, *v.* Riverside Cooperative Club et al., 140 Mich., 538 (1905).

[4] Walsh *v.* Association of Master Plumbers et al., 97 Mo. App., 280 (1902). See also Bailey *v.* Master Plumbers, 103 Tenn., 99 (1899), and Knight & Jillson Co. *v.* Miller, 172 Ind., 27 (1909).

[5] State *v.* Firemen's Fund Ins. Co. et al., 52 S. W., 595 (Mo. Sup. Ct., 1899).

[6] Missouri Rev. Stats., 1909, sec. 10299 et seq.

modity of sale or manufacture may not issue a price current. But such a list or compilation of prices ought either to be compiled and promulgated by an indifferent or wholly disinterested person, or, if compiled and promulgated by an interested person, it ought to be honestly and fairly compiled; it ought fairly to represent current prices as based upon actual sales, or upon actual offers to buy and actual offers to sell, and not misrepresent such prices with a view of boosting any prices of any item or items. If in the instant case there had been touching this price current matter no antecedent unlawful acts of the Yellow Pine Association, if this association had not for years promulgated as current prices lists which falsely represented and arbitrarily fixed the price of yellow pine lumber pursuant to the adopted report of a committee on values, and if Smith, the secretary of the association, pursuing the lawful methods originated by him of obtaining reports from correspondents of actual sales, had fairly compiled and averaged such reports into a list of current prices of yellow pine lumber, we would not say that Smith's acts or the acts of the association in this behalf were unlawful. In truth the name "prices current" explains itself in law as in diction. To pursue the matter further would be merely to define common honesty, the rules of which in the last analysis are all the respondents in this matter are by law required to follow.[1]

In New York, where it has been made a misdemeanor to conspire to commit any act injurious to trade or commerce,[2] the Court of Appeals affirmed the conviction of the members of the Lockport Coal Exchange, which, it appeared, was by the articles of agreement adopted by the members, authorized to, and did, fix and advance the prices to be charged by members for coal, although it was not shown that such prices were excessive or oppressive, or were more than sufficient to afford a fair remuneration to the dealers.[3] This act has also been successfully invoked against the members of a combination formed for the purpose of destroying competition and fixing and maintaining the prices at which poultry should be bought and sold. It appeared that a poultry dealers' association and a jobbers' association agreed that commissions should be pooled, and that the jobbers should purchase all the poultry required at prices fixed by the two associations. A number of the members of both organizations were convicted of the crime of conspiracy and the judgment was affirmed on appeal.[4]

In the cases above noted the fixing of prices affected members and nonmembers alike. In the following cases the fixing of prices discriminated against nonmembers in favor of members. The purpose and effect of rules or by-laws which provide for such discrimination

[1] State ex inf. Atty. Gen. *v.* Arkansas Lumber Co. et al., 169 S. W., 145, 176, 177, 179, 180 (Mo. Sup. Ct., 1914). And see State *v.* Adams Lumber Co., 81 Nebr., 392 (1908).

[2] New York Cons. Laws, Penal Law, sec. 580 (6).

[3] People *v.* Sheldon et al., 139 N. Y., 251 (1893).

[4] People *v.* Dwyer et al., 145 N. Y. Supp., 748 (Sup. Ct., App. Div., 1914). In this case it was held that as the indictment also charged a violation of the Business Law (Consol. Laws, ch. 20, secs. 340, 341), and also a conspiracy to commit a crime under Penal Law, art. 54, sec. 580 (1), it was not material whether subdivision 6 of the latter section was repealed by the subsequent enactment of the Business Law.

was clearly shown in a decision by the Supreme Court of Michigan.[1] There it appeared that the membership of a club was composed of members of a Master Plumbers' Exchange, of all manufacturers of, and of all dealers in, plumbers' supplies in Detroit. The rules of the club provided, among other things, that the price of supplies should be fixed by a committee, and that they should be sold without discrimination to members, but that nonmembers should be charged 15 to 30 per cent more than members. Referring to this discrimination, the court observed:

> The advantage that this arrangement gives the plumber members over the plumber nonmembers is obvious. The latter must buy their supplies either in the local markets at excessive prices, or abroad at a great disadvantage. It is scarcely necessary to say that this arrangement was designed to create, and tends to create, a practical, though possibly incomplete, monopoly in favor of the plumber members.

Although, acting on the advice of counsel, the defendants abrogated the provision requiring discrimination against nonmembers, the court found that their purpose remained unchanged, and that the only effect of eliminating the provision was to make discrimination an implied, instead of an expressed, part of the contract; and concluded that the parties had attempted to create a monopoly and had restricted competition in violation of the antitrust act.[2]

Likewise in Indiana, where the evidence disclosed a conspiracy to prevent competition in the plumbing business, pursuant to which two corporations dealing at wholesale in plumbing supplies had made sales to members of a plumbers' association at from 30 to 75 per cent less than list prices, and had also refused to sell for cash to the plaintiff, a licensed plumber, solely because he was not a member of the association, the court, under a statute[3] which was held to be declaratory of the common law, enjoined all the parties from refusing to sell, or inducing others not to sell, to the plaintiff for cash, at the usual and customary prices.[4] In Missouri, members of a manufacturers' association under suspended legal action agreed to make no distinction between members and nonmembers of a retail dealers' association and to treat all retail dealers alike in the matter of making sales.[5] In another case it appeared that a farmers' cooperative society had adopted a by-law which in effect compelled all members to sell their hogs to the society at such price as it might offer, or, in the event of sale to another, to forfeit and pay to the

[1] Hunt, Pros. Atty. of Wayne County, *v.* Riverside Cooperative Club et al., 140 Mich., 538 (1905).

[2] Michigan Public Acts, 1899, act No. 255.

[3] Burns' Ann. Stats. (1908), secs. 3884, 3887.

[4] Knight & Jillson Co. et al. *v.* Miller, 172 Ind., 27, 31 (1909).

[5] State ex inf. Attorney General *v.* Arkansas Lumber Co. et al., 169 S. W., 145, 170 (Mo. Sup. Ct., 1914).

society 5 cents per hundredweight.[1] In purchasing hogs belonging to members, a competing dealer was obliged to offer 5 cents per hundredweight more than the defendant, and it appeared that in actual usage in the market he was compelled to pay 10 cents per hundredweight more than was offered by the society. The court, being of opinion that the arrangement was unlawful both at the common law and under the State antitrust law,[2] enjoined the society and its officers from enforcing the objectionable by-law.

Violations of the Sherman Antitrust Act whereby the prices fixed affected members and nonmembers alike, in one case consisted of an agreement between a fuel company and an association composed of a number of persons independently engaged in producing coal and coke in a certain district, providing that the fuel company should act as selling agent for that portion of the entire output of the association intended for western shipment over a leading route of transportation, and for the fixing by a committee of a minimum price at which such product was to be sold;[3] in another case the illegal agreement complained of prohibited the sale of coal, except at prices established by an exchange;[4] and in still another case the association established prices below which members were not allowed to sell shingles.[5]

The charging of fixed prices to all and higher prices to nonmembers than to members was also condemned in a case arising under the Sherman Antitrust Act wherein price control was sought to be accomplished by an agreement incorporated as a section of the association's by-laws. This agreement prohibited wholesale dealers in coal brought in from other States and foreign countries from selling such commodity at trade rates to any one not having an established yard, and prohibited both wholesale and retail dealers from selling to consumers (except certain specified classes) at less than rates established by the association. It also prohibited wholesale dealers from selling coal to nonmembers at less than $1 per ton over "present trade rates." Offending retail members were penalized by being required to buy at consumers' prices, and nonmembers by "such

[1] Reeves *v.* The Decorah Farmers' Cooperative Society et al., 160 Iowa, 194 (1913).

[2] Iowa, 33 G. A. (1909), ch. 225. And see Judd *v.* Harrington, 139 N. Y., 105 (1893), where an agreement between an association of brokers and dealers in sheep and lambs and an association of butchers, whereby the brokers were to sell only to the butchers and the latter to buy only of the brokers belonging to their respective associations, was held to be an agreement contrary to public policy and void, since its real nature was to suppress competition in an article of food and to tend to enhance the price.

[3] Held, that such contract was illegal under the antitrust law as in restraint of interstate commerce and as tending to create a monopoly. Chesapeake & Ohio Fuel Co. *v.* United States, 105 Fed., 93 (1900), and 115 Fed., 610 (1902).

[4] United States *v.* Jellico Mountain Coal Co., 46 Fed., 432 (1891).

[5] Gibbs *v.* McNeeley, 102 Fed., 594 (1900); 107 Fed., 210 (1901); and 118 Fed., 120 (1902).

reasonable penalties as may be imposed upon him by the association." This agreement was held to be in violation of the Sherman Antitrust Act.[1]

Where, however, the activities of an association were confined to a restricted locality, although partly in one State and partly in another, and where the services rendered by members of the association as commission merchants, acting between prospective purchasers and owners of live stock, were local to the particular stockyard, such transactions were held by the United States Supreme Court not to be interstate commerce. The agreement in this case regulated the terms on which members would render such local services, and therefore was not an agreement in restraint of interstate commerce.[2]

Consent decrees under the Sherman Antitrust Act have also prohibited price-fixing activities of associations. Thus, the Southern Wholesale Grocers' Association was enjoined from fixing prices, or from coercing manufacturers into price-fixing agreements, or from accepting rebates or bonuses from manufacturers for maintaining prices, or from conspiring to increase prices of commodities sold by the wholesalers and jobbers, and from any agreement which interferes with the free flow of commerce.[3] So, also, the "Association of Coaster Brake Licensees" was enjoined from fixing sale and resale prices, or establishing trade discounts, trade rebates, terms of credit, or any other terms and conditions relating to the sale, shipment, and trade by any

[1] The Coal Dealers' Association of California, unincorporated, adopted as a section of its by-laws the agreement above noted, which agreement stated its purpose as, first, the protection of consumers in receiving full amount and kind of coal purchased, and, second, protection to dealers in obtaining sufficient margin to carry on a safe business with justice to consumers. Held, "that commerce among the several States and with foreign nations must be absolutely free and untrammeled, except as it may be regulated by Congress; that no State law, with certain exceptions not necessary here to state, would be allowed to interfere with it, and no contract or agreement on the part of individuals, associations, or corporations, would be permitted, directly or indirectly, to hinder or restrain its natural current or volume * * * that the constitution and by-laws of the Coal Dealers' Association and the agreement of the wholesale dealers with that association came within the prohibition of the act of July 2, 1890" [Sherman Antitrust Act]. United States *v.* Coal Dealers' Association of California, 85 Fed., 252 (1898).

[2] The Kansas City Live Stock Exchange, a voluntary unincorporated association composed of commission merchants, who bought, sold, and handled substantially all of the live stock shipped to Kansas City from several States, operated under an agreement providing that each member should faithfully observe and be bound by articles of association and rules and by-laws. Among the rules were fixed rates of commission for buying and handling in a certain city, live stock, a large proportion of which was from other States, and limitations and prohibitions upon its members in dealing with nonmembers and with persons violating the rules and regulations of the exchange. These rules and regulations were enforceable by fines, penalties, and assessments. Held, as above stated, United States *v.* Hopkins, 171 U. S., 579 (1898).

A somewhat similar case is found in United States *v.* Anderson, except that the defendants were themselves purchasers of cattle in the Kansas City stockyard, while defendants in the Hopkins case sold cattle on commission as compensation for services. United States *v.* Anderson, 171 U. S., 604 (1898).

[3] United States *v.* Southern Wholesale Grocers' Assn., 207 Fed., 445, 446 (1911).

of its members.[1] The National Association of Retail Druggists was also enjoined from issuing or aiding in any way in the publication of lists or other documents purporting to contain the names of persons adhering or not adhering to their contracts, or maintaining or refusing to maintain prices, from securing or aiding in securing the adoption of any schedule for the sale of drugs, etc., by the retail dealers of any market to the consumers of said market, and from enforcing the maintenance of any such schedule; and all such lists, documents, schedules, contracts, agreements, and understandings were declared unlawful and ordered recalled.[2]

Section 23. Prevention of sales.

The prevention of sales to consumers and others is one of the methods of fixing the channels of trade, above referred to, which, in the more recent cases, has been repeatedly condemned by the courts. Trade associations early sought to accomplish this purpose by adopting by-laws or constitutions designed to prohibit members from dealing with manufacturers or wholesalers who sold to consumers, or who sold to such brokers or dealers as were regarded by the association as not entitled to purchase commodities at wholesale prices. Transactions of this nature were penalized by requiring offending manufacturers and wholesalers to pay a commission to the dealers in whose territory such sales were made. Refusals to comply with such demands were to be met with concerted withdrawals of patronage. While one or two early decisions[3] seemed to have upheld the legality of by-laws or agreements of this character, the weight of authority is decidedly against them.

Decisions condemning the performance of association agreements of this character hold that damages resulting therefrom are recoverable, or, in a proper case, their future performance may be restrained by injunction. Thus, where a manufacturer was compelled by a retail lumber dealers' association to pay a penalty for selling lumber to a consumer through a broker in territory supplied by a member of a retail dealers' association, and, as a consequence of such fine, thereafter refused to sell to the broker; held, that the latter could recover damages from the association member who had compelled the payment of the penalty, and that an injunction should issue restraining the defendants from demanding a penalty under the by-laws from anyone who sold to the broker, or through the broker to the consumer, and from interfering with the broker's business in any way other than by fair, open competition.[4] So, also, where a firm of

[1] United States v. New Departure Mfg. Co. (1913).

[2] United States v. National Assn. of Retail Druggists (1907).

[3] Bohn Manufacturing Co. v. Hollis, 54 Minn., 223 (1893); also Montgomery Ward & Co. v. South Dakota Merchants & Hardware Dealers' Association, 150 Fed., 413 (C. C., 1907).

[4] Jackson v. Stanfield et al., 137 Ind., 592 (1894).

manufacturers suffered a loss of business as a result of a letter circulated by a retail dealers' association notifying members of sales made to consumers by, and requesting them not to deal with, the firm of manufacturers, such letter having been sent presumably as a consequence of by-laws which made it the duty of members to discontinue purchasing from manufacturers or wholesalers who sold to consumers, the Texas Court of Civil Appeals held that said manufacturers could recover damages from members of the association, that members had no right to prevent the manufacturer from selling to consumers, and, further, that such interference with his business served no legitimate purpose connected with their own.[1] Likewise the Iowa Supreme Court denounced as unlawful an agreement among retail dealers to prevent farmers' cooperative companies from securing supplies by coercing wholesalers and jobbers in the matter of refusing to sell.[2] So, also, an Iowa district court in the same year granted an injunction restraining the members of the Iowa Implement Dealers' Association from "in any manner whatever interfering with the business of the plaintiff, from preventing or attempting to prevent any jobber, wholesaler, or vender of farm implements * * * from selling * * * to the plaintiff" company.[3]

Agreements among the members of associations of retail dealers not to deal with manufacturers or wholesalers who sold to consumers in territory supplied by any of the parties to the agreement have, in a number of cases, been held to violate State statutes prohibiting combinations to restrain trade or to hinder or lessen competition. Thus, where the constitution of an association of retail lumbermen provided that the members, upon notice by the secretary, should discontinue purchasing from any manufacturer or wholesaler who had sold to a consumer, the Supreme Court of Mississippi held the association to be a combination in violation of the State statute.[4] This statute prohibits combinations "intended to hinder competition in * * * the sale or purchase of a commodity."[5] Where it clearly

[1] Olive & Sternenburg *v.* Van Patten et al., 7 Tex. Civ. App., 630 (1894).

[2] Funck *v.* Farmers' Elevator Co., of Gowrie, et al., 142 Iowa, 621 (1909).

[3] Farmers' Elevator Co. *v.* Iowa Implement Dealers' Association et al. Unreported decision of Wright, J., in the district court of Webster County, Iowa, September term, 1909.

[4] Mississippi Code, 1906, sec. 5002.

[5] Retail Lumber Dealers' Assn. *v.* Mississippi, 95 Miss., 337 (1909). This case was appealed to the Supreme Court of the United States, where it was held that the State statute did not violate the Federal Constitution. In discussing the nature of the agreements prohibited by the act, the Supreme Court said:

"* * * they * * * have agreed not to deal with anyone who makes sales to consumers, which sales might have been made by any one of the 77 independent members of the association. Thus they have stripped themselves of all freedom of contract in order to compel those against whom they have combined to elect between their combined trade and that of consumers. That such an agreement is one in restraint of trade is undeniable, whatever the motive or necessity which has induced the compact. Whether it would be an illegal restraint at common law is not now for our determination." (Grenada Lumber Co. *v.* Mississippi, 217 U. S., 433 (1910).

appeared that one of the objects of a similar association was to prevent manufacturers and wholesalers from selling to consumers, and the constitution and by-laws provided for a penalty to be collected from manufacturers or wholesalers who made such sales, the Supreme Court of Nebraska held that such purpose was clearly in contravention of a State statute,[1] which prohibited any combination of dealers intended "to prevent others from conducting or carrying on the same business," or which tended "to prevent or preclude a free and unrestrained competition among themselves or others or the people generally."[2] The action of an association of retail lumber dealers in preventing manufacturers and wholesalers from making sales to consumers was also held, in a subsequent Nebraska decision, to be in violation of the State antitrust laws.[3] In this case the secretary took up complaints of members in a manner which left no doubt in the minds of offending wholesalers or dealers that such sales were displeasing. This, apparently, in the opinion of the court, carried the implied threat of the withdrawal of patronage.[4]

The cases just treated involve the prevention of sales to consumers, while the following cases involve efforts to prevent sales to objectionable dealers. The common-law decisions in these, as in the above-cited cases, are not in accord. Thus, a leading decision in Rhode Island denied an injunction to restrain members of an association of master plumbers from notifying dealers in plumbers' supplies that the association members were withdrawing their patronage and would continue to do so unless said dealers refrained from selling the commodities in which they dealt to certain master plumbers who were not members of said association;[5] and where an association of dealers engaged in buying and selling cattle adopted a by-law prohibiting its members from dealing with any trader not a member of the association, or with anyone who dealt with nonmembers, it was held that those outside the association, being only incidentally affected, had no standing in a court of equity to restrain the enforcement of such by-laws.[6]

Taking a decidedly opposite view, the Supreme Court of Tennessee declared obnoxious to the common law a by-law which prohibited members of an association of master plumbers from purchasing from any manufacturer or dealer who did not comply with the rules of the association, or from any jobber who purchased from a manufacturer who sold to master plumbers who were not members of the association.[7] In another case the Supreme Court of Wisconsin held

[1] Cobbey's Annotated Stats., sec. 11510; Comp. St. 1901, ch. 91a, sec. 11.
[2] Cleland *v.* Anderson, 66 Nebr., 252 (1902).
[3] Nebraska Laws, 1905, ch. 162; Comp. St., 1901, ch. 91a.
[4] State *v.* Adams Lumber Co., 81 Nebr., 392 (1908).
[5] Macauley Bros. *v.* Tierney et al., 19 R. I., 255 (1895).
[6] Downs *v.* Bennett et al., 63 Kans., 653 (1901).
[7] Bailey *v.* Master Plumbers, 103 Tenn., 99 (1899).

on demurrer that an action for damages would lie against the parties to an agreement, in favor of a retailer whose business had been destroyed as the result of the performance of the agreement, between wholesale coal dealers and certain retail dealers, binding the former to sell coal to the latter only. This agreement was made for the purpose, among others, of forcing out of business all retail dealers not parties thereto.[1]

The action of associations in similarly preventing sales to nonmembers has also been held in violation of State antitrust laws.[2]

The stifling or elimination of competition by prohibiting or unduly influencing mine owners, manufacturers, wholesale dealers, or others, to refuse or to desist from selling to nonmembers, to consumers, to so-called "objectionable" dealers, or to others has been at issue in a number of cases involving interpretation of the Sherman Antitrust Act. Briefly stated, the judicial decisions in the cases herein selected under the Sherman Act covering this class of association activities condemned the following: A written agreement among members, binding them under penalty not to sell in a certain city, coal imported from another State, except to members;[3] an agreement binding members not to purchase materials from manufacturers located in other States, who were not members, and not to sell unset tiles to nonmembers, except at 50 per cent more than the price charged members;[4] an agreement prohibiting members from selling books to anyone who cut prices or to anyone who should be known to have

[1] Hawarden *v.* The Youghiogheny & Lehigh Coal Co., 111 Wis., 545 (1901).

[2] Nebraska Comp. St., 1901, chap. 91a. See Cleland *v.* Anderson, 66 Nebr., 252 (1902), and State *v.* Adams Lumber Co., 81 Nebr., 392 (1908).

For violations of Missouri statutes see State *v.* Arkansas Lumber Co., 169 S. W., 145, 179 (1913); Walsh *v.* Association of Master Plumbers, 97 Mo. App., 280 (1902).

For violation of Michigan laws (Mich. Public Acts, 1899; act No. 255, sec. 1) see Hunt *v.* Riverside Cooperative Club, 104 N. W., 40, Supreme Court of Michigan (1905).

[3] The "Nashville Coal Exchange," composed of a number of companies mining coal in Kentucky and Tennessee and a number of coal dealers in Nashville, Tenn., was formed for the purpose of regulating the price of coal at Nashville. Its members agreed not to ship coal to Nashville or to sell coal therein except to members, and, under penalty of fine, also agreed not to sell except at prices established by the exchange or association. This was held to be in violation of the act of July 2, 1890, and the members were enjoined from further violations of that act. United States *v.* Jellico Mountain Coal Co., 46 Fed., 432 (1891).

A substantially identical case is found in United States *v.* Coal Dealers' Assn., 85 Fed., 252 (1898).

[4] In an action for treble damages against an unincorporated association of wholesale dealers residing in California, having as nonresident members manufacturers in other States, held that although the sales of unset tiles were within the State of California, and although such sales constituted a very small portion of the trade involved, agreement of manufacturers without the State not to sell to anyone but members was part of a scheme which included the enhancement of the price of unset tiles by the dealers within the State, and that the whole thing was so bound together that the transactions within the State were inseparable and became a part of a purpose which, when carried out, amounted to and was a combination in restraint of interstate trade and commerce. Montague & Co. *v.* Lowry, 193 U. S., 38 (1904).

sold to others who cut prices on copyrighted books;[1] the sending of lists to manufacturers, and, on request, the furnishing to manufacturers of information as to the standing of applicants for the privilege of buying direct from manufacturers;[2] and the distribution of an "official list" among the members of retail dealers' association containing the names of wholesalers who had solicited, quoted, or sold directly to consumers of lumber.[3]

Association activities enjoined under consent decree in suits brought for violations of the Sherman Antitrust Act may be here stated as follows: The members of a wholesale jewelers' association and of a manufacturing jewelers' association were enjoined from agreeing not to purchase from manufacturers of jewelry who sold to jobbers not recognized by the association, or to retailers, or to any person desiring to purchase, or from preventing sales between any persons whomsoever desiring to buy or sell jewelry. They were also enjoined from boycotting, threatening, intimidating, whitelisting, or blacklisting any of the classes of persons contemplated by the decree, or from trying to induce manufacturers not to sell to any person.[4] A plumbers' supply association was enjoined from publishing lists of members for the purpose of preventing sales by manufacturers to nonmembers, or lists of manufacturers who agreed to sell only to

[1] This agreement by all members of a publishers' association controlling 90 per cent of the book business in the country was held to be an agreement relating to interstate trade or commerce within the antitrust act (act of July 2, 1890, chap. 647, 26 Stat., 209). A black list was kept, containing the names of those who cut prices on copyrighted books and those who sold to price cutters, and no one on the black list could buy any books of anybody in the scheme. It was held that such scheme constituted a conspiracy in restraint of interstate trade or commerce. The rights acquired by publishers of copyrighted books under the copyright law did not justify them in combining and agreeing that their books should be subject to the rules laid down by the united owners, one of which was that no member of the association should sell any books to a blacklisted purchaser who was known to cut prices. Mines *v.* Scribner, 147 Fed., 927 (1906).

A somewhat similar case is found in Straus *v.* American Publishers' Assn., 231 U. S., 222 (1913).

[2] Held, that these acts constituted a violation of the decree, since, considered in connection with the former policy of coercion, they constituted a deliberate utilization by the association of the influence over the manufacturers which its previous policy had gained for it, especially where subsequent to the decree it mailed to manufacturers a circular stating that it would continue to issue the "Green Book" [containing lists of exclusive wholesale grocers, and used as a means of compelling manufacturers to confine their sales to those whose names appeared on the list]. This circular stated that none of its methods, rules of practice, or activities would be affected by the decree. Difficulty was experienced in the direct buying from certain manufacturers supplied with lists unless the buyer's name appeared on the lists, and a general impression prevailed that listing was essential to direct-buying privileges. (United States *v.* Southern Wholesale Grocers' Assn. et al., 207 Fed., 434.)

[3] The United States Supreme Court held that the circulation of this report "tended to prevent members of the association from dealing with the listed dealers referred to in the report, and to directly and unreasonably restrain trade by preventing it with such listed dealers, and was within the prohibitions of the Sherman Law"; and that "while a retail dealer may unquestionably stop dealing with a wholesaler for any reason sufficient to himself, he and other dealers may not combine and agree that none of them will deal with such wholesaler without, in case interstate commerce is involved, violating the Sherman Law." Eastern States Lumber Dealers' Assn. *v.* United States, 234 U. S., 600 (1914).

[4] Consent decree in United States *v.* National Wholesale Jewelers' Assn. (1914).

members, or lists of nonmembers, and from boycotting manufacturers for having sold to nonmembers, and from preventing jobbers from engaging in business; or from engaging in any agreement which restricts the "free and unrestrained" flow of commerce.[1] The decree in the Southern Wholesale Grocers' case (above referred to) enjoined members from combining or conspiring to prevent manufacturers from selling to nonmembers, from publishing a white list, from coercing manufacturers into refusing to sell to price cutters, and from boycotting manufacturers for having sold to nonmembers. The members of the Philadelphia Jobbing Confectioners' Association were likewise enjoined from conspiring to withhold their patronage from any manufacturer for having sold to nonmembers, or from conspiring to prevent manufacturers from selling freely in the open market, or from publishing white lists of members of the association for the purpose of influencing manufacturers not to sell to nonmembers, and from conspiring to induce manufacturers not to sell to retailers or jobbers who were not members of the association.[2] Certain manufacturers were enjoined from entering into any agreement or understanding with each other or with the National Association of Retail Druggists or the National Wholesale Druggists' Association in refusing to sell, or from discriminating in sales, to persons whose names appeared on any list of persons purporting to adhere or not to adhere to their contracts, or to maintain or refuse to maintain prices, and from blacklisting manufacturers and wholesale contract proprietors.[3] The members of the "Association of Coaster Brake Licensees," an association of owners of patent rights relating to coaster brakes, were bound under patent and license contracts to maintain uniform and noncompetitive prices and resale prices. The agreement also covered certain other unpatented parts of bicycles and motorcycles. The association sought to prevent, among other things, sales to manufacturers, jobbers, and dealers, who were not listed by the joint action of members. By consent decree the defendants were enjoined from soliciting, making up, ratifying, or confirming any lists of manufacturers, or jobbers, or dealers, with whom trade should or should not be carried on.[4]

Section 24. Limitation of output.

As noted in the first part of this chapter, agreement to control prices by curtailing output is frequently found in particular combinations, but not primarily as an association activity. This is borne out by an examination of the decisions, many of which condemn this

[1] Consent decree in United States *v.* Pacific Coast Plumbers' Supply Assn. et al. (1912).
[2] Consent decree, United States *v.* Philadelphia Jobbing Confectioners' Association (1913).
[3] Consent decree, United States *v.* National Association of Retail Druggists (1907).
[4] Consent decree, United States *v.* New Departure Mfg. Co. (1913).

method of control but few of which involve activities of associations having any degree of formal organization. In one case the Missouri Supreme Court found that members of the Yellow Pine Manufacturers' Association had violated the Missouri antitrust laws,[1] by curtailing output under agreement and through concerted action.[2] The court suspended a writ of ouster upon certain conditions which included the filing of affidavits declaring that respondents would not be parties to any agreement or understanding to control the production of lumber.

Likewise, a Federal court condemned, as in violation of the Sherman Antitrust Act, an agreement to restrict the output of shingles manufactured in the State of Washington and sold and used principally in other States.[3]

Section 25. Allotment of customers and division of territory.

What has been said of the "limitation of output" is also true of the practice of allotting designated customers to specified persons, namely, this is more frequently a purpose of particular combinations than of such associations as are considered in this chapter. However, when such purposes are involved in trade-association cases they have been judicially condemned. Thus, in reaching the conclusion that the purpose of a certain printers' club was to create a monopoly and stifle competition, the Supreme Court of Georgia considered, among other things, an allegation charging the establishment of a system whereby the manager of a printers' club notified members, each in his turn, to secure contracts as they were asked for by the city of Atlanta, while other members refrained from submitting bids or submitted them in such a manner that the contract would be awarded according to a prearranged plan; and that in furtherance of this system a member who disregarded it was fined and notified that the right to name future prices for printing would "irrevocably revert" to the other members of the club.[4]

Division of territory is closely, but not inseparably, connected with allotment of customers, as the latter may be accomplished without reference to location. One form of dividing territory among speci-

[1] Missouri Rev. Stats., 1909, sec. 10299 et seq.

[2] State ex inf. Atty. Gen. *v.* Arkansas Lumber Co. et al., 169 S. W., 145 (1914).

[3] The Washington Red Cedar Shingle Manufacturers' Association, unincorporated, composed of manufacturers of red-cedar shingles and dealers handling the same, and having for its object the prevention of injurious competition, was charged with having restricted the output of shingles, as above noted, and with having established prices of shingles below which members were not allowed to sell. Held, a combination in restraint of interstate trade and unlawful under the Sherman Antitrust Act. Gibbs *v.* McNeeley, 102 Fed., 594 (1900); 107 Fed., 210 (1901); 118 Fed., 120 (1902).

[4] Employing Printers' Club et al. *v.* Dr. Blosser Co., 122 Ga., 509 (1905). See also Leonard *v.* Abner-Drury Brewing Co., 25 App. D. C., 179 (1905), where the court condemned an attempt by a brewers' association and others to compel a nonmember to join the association in order that its regulations looking to an advance in the price of beer and the allotment of customers might be enforced.

fied dealers quite common to association purposes is found in attempts to prevent sales by others in territory supplied by any member. Of the decisions previously treated in this chapter, one of early date, rendered by a State supreme court,[1] and a later one by a Federal court,[2] indicated that association activities of this nature were formerly permissible. Other decisions, and especially those of recent date, however, quite generally condemn them.

Section 26. Means of accomplishing association purposes.

Since the legality of the means adopted has been noted in connection with the four purposes already treated, it is sufficient here to treat this phase of the subject in a general way only. Probably the means most frequently used to enforce commercial relations sought to be established by trade associations is the boycott, and the most common form of boycott is the actual or threatened withdrawal of patronage. While some of the earlier decisions at common law seem to have held this to be a legitimate means of enforcing associations rules,[3] the weight of authority, at common law and numerous statutes, condemn such actions as unlawful.[4]

In the cases herein treated the usual method of effecting boycotts was to circulate periodically a printed list containing the names of those who had violated association regulations, or to convey similar information by letter, or to effect the same result by publishing a list limited to names of those with whom members were permitted to deal. The first two methods are known as blacklisting and the last as whitelisting. Various specific names, such as Blue Book, Red List, Bad-Pay List, etc., have been given to lists of this nature or to similar expedients.

The successful accomplishment of the four purposes above treated—(1) price control, (2) prevention of sales, (3) limitation of output, and (4) allotment of customers and division of territory—have depended largely upon the exercise of restraint, sometimes confined to the members but usually applied also to nonmembers; and

[1] Bohn Manufacturing Co. *v.* Hollis, 54 Minn., 223 (1893).

[2] Montgomery Ward & Co. *v.* South Dakota Merchants & Hardware Dealers' Association, 150 Fed., 413 (C. C., 1907).

[3] Bohn Mfg. Co. *v.* Hollis et al., 54 Minn., 223 (1893); Montgomery Ward & Co. *v.* South Dakota Retail Merchants & Hardware Dealers' Association, 150 Fed., 413 (1907); Macauley Bros. *v.* Tierney et al., 19 R. I., 255 (1895).

[4] Brown & Allen et al., *v.* Jacobs Pharmacy Co., 115 Ga., 429 (1902); Klingel's Pharmacy *v.* Sharp & Dohme et al., 104 Md., 218 (1906); Employing Printers' Club et al. *v.* Dr. Blosser Co., 122 Ga., 509 (1905); Funck *v.* Farmers' Elevator Co. of Gowrie et al., 142 Iowa, 621 (1909). See also Continental Insurance Co. *v.* Board of Fire Underwriters, 67 Fed., 310 (1895); Purington *v.* Hinchcliff, 120 Ill. App., 523, affirmed 219 Ill., 159 (1905); Downes et al. *v.* Bennett et al., 63 Kans., 653 (1901); Olive & Sternenberg *v.* Van Patten, 7 Tex. Civ. App., 630 (1894); Park & Sons Co. *v.* National Wholesale Druggists' Association et al., 50 N. Y. Supp., 1060 (1896); Straus *v.* American Publishers' Association, 177 N. Y., 473 (1904); Walsh *v.* Association of Master Plumbers, 97 Mo. App., 280 (1902); Retail Lumber Dealers' Association *v.* State of Miss., 95 Miss., 337 (1909); Cleland *v.* Anderson, 66 Nebr., 252 (1902).

while the decisions considered as a whole are not in accord, yet it fairly may be concluded that boycotting for the most part, under most circumstances, is illegal. There is, however, a fifth class of purposes (designated below as "mutual protection against delinquent debtors"), usually enforced by a species of boycott, which, in the absence of statutory prohibition, has in many instances escaped judicial condemnation.

Section 27. Mutual protection against delinquent debtors.

Blacklists in the form of bad-pay lists, cash-before-delivery lists, abstracts of unsettled accounts, lists of delinquent debtors, and the like, adopted by trade associations to lessen credit risks by the interchange among members of accurate information concerning the financial standing of their customers, are usually held to give no ground of action at law for damages to the retail dealer or private citizen who thereby suffers a loss of credit. And this is true even where the constitutions or by-laws of the associations forbid the members, under penalty of fine or expulsion, to extend further credit to the person reported as long as his name remains on the delinquent list. In some cases there has been a refusal to give relief even where the regulations forbid members to sell for cash to the debtor until he has settled the claim for which he has been listed.

The party whose business or credit has been thus curtailed or destroyed can not ordinarily succeed in an action for libel. Proof of the statement published is, in the absence of special statutes, a good defense to such an action. And where the members can show such a common interest to protect as to render the statement qualifiedly privileged, the aggrieved party, in order to succeed, must show not only that the statement is false but also that it was made with express malice.[1] As to the degree of common interest necessary to establish a privilege, however, the decisions are not in harmony, and in some of them the effect of the privilege seems to be either denied or disregarded.[2] Where all dealings by the members with the debtor, for cash as well as on credit, are prohibited until his claim is settled, there is a tendency to recognize an element of coercion that is repugnant to

[1] Reynolds *v.* Plumbers' Material Protective Association, 63 N. Y. Supp., 303 (1900); affirmed by Court of Appeals, 169 N. Y., 614 (1902); Trapp *v.* Dubois, 78 N. Y. Supp., 505 (1902); Weston *v.* Barnicoat, 175 Mass., 454 (1900); McIntyre *v.* Weinert, 195 Pa., 52 (1900); Ulery *v.* Chicago Live Stock Exchange, 54 Ill. App., 233 (1894); White *v.* Parks, 93 Ga., 633 (1894), 20 S. E., 78.

[2] Muetze *v.* Tuteur, 77 Wis., 236 (1890); Woodhouse *v.* Powles, 43 Wash., 617 (1906); Denney *v.* Northwest Credit Association, 55 Wash., 331 (1909), 104 Pac., 769; Western Union Telegraph Co. *v.* Pritchett, 108 Ga., 411 (1899); Werner *v.* Vogeli, 10 Kans. App., 536 (1901); Cleveland Retail Grocers Association *v.* Exton, 18 Ohio Circuit Court, 321 (1899); Windisch-Muhlhauser Brewing Co. *v.* Bacom, 21 Ky. L. R., 928 (1899); John Brenner Brewing Co. *v.* McGill, 23 Ky. L. R., 212 (1901); Nettles *v.* Somervell, 6 Tex. Civ. App., 627 (1894).

the existence of the privilege;[1] and in a case in Wisconsin[2] in which the restriction was not carried to the extent of prohibiting cash dealings, the court said that communications sent to members of an organization to compel delinquent debtors to pay, showing the name of debtor on the delinquent list, are libelous and not privileged, where the object is not to protect members from trusting such debtors, but merely to aid them in coercing payment, and the members of the association are not interested in the communications in any other way than to make their own debtors pay.

Actions for damages caused by such combinations have apparently thus far, with few exceptions, also been unavailing. In one of the New York cases cited above[3] the Plumbers' Material Protective Association was incorporated under a law that, among other things, authorized it to "diffuse accurate and reliable information among its members as to the standing of merchants and builders."[4] Upon failure to settle a claim against him or to either give the association satisfactory reason for the failure or submit to arbitration, the plaintiff was listed, with the result that he could buy no further supplies from the members except for cash before delivery. It was urged that the statute under which the association was incorporated operated in restraint of trade and against public policy and hence was void. But, in view of the growth and development of commercial enterprise, the court regarded combination for mutual protection against irresponsible parties as a necessity and held such combination among the members of the corporation not to be unlawful.

In one Kentucky case[5] in which recovery was denied, the position was taken that the plaintiff might recover in such an action if the statement published was untrue, but in a later case[6] in the same State it is intimated that there can be no recovery in such an action even if the statement is false and made by a combination operating in violation of an antitrust statute which absolves persons from liability for payment for goods bought from members of unlawful combinations. Recovery is also denied in Illinois and Texas.[7]

In Missouri, however, an agreement among Kansas City brewers not to sell beer to anyone who was in debt to either of the others for beer previously purchased until he paid such debt, was held to be in violation of the State antitrust statute. And by virtue of a provision

[1] Weston *v.* Barnicoat, 175 Mass., 454 (1900); Denney *v.* Northwest Credit Association, 55 Wash., 331 (1909), 104 Pac., 769. See also Hartnett *v.* Plumbers' Supply Association, 169 Mass., 229 (1897); and Arbour *v.* Pittsburgh, etc., Association, 35 Pa. County Rep., 595 (1907).

[2] Meutze *v.* Tuteur, 77 Wis., 236 (1890).

[3] Reynolds *v.* Plumbers' Material Protective Association, 63 N. Y. Supp., 303 (1900), affirmed 169 N. Y., 614 (1902).

[4] New York Laws, 1886, chap. 338.

[5] Schulten *v.* Bavarian Brewing Co., 96 Ky., 224 (1894).

[6] Brewster *v.* Miller's Sons Co., et al., 101 Ky., 368 (1897).

[7] Ulery *v.* Chicago Live Stock Exchange, 54 Ill. App., 233 (1894); Deis *v.* Winfree, 6 Tex. Civ. App., 11 (1894).

in the statute a party was allowed to set up the agreement as a complete defense to an action by one of such brewers to recover the price of beer sold.[1]

In Nebraska the court seemed to feel no hesitancy whatever in allowing recovery.[2] Here the association's constitution provided that when an account against any person had been listed in the "abstract of unsettled accounts" no member should open an account with the delinquent without security, without rendering himself liable to a $20 fine or to expulsion. The plaintiff suffered injury to his credit as a result of being listed for failure to pay a note for $13.40. The court said that, where the holder of a claim sets in motion such a contrivance as this and damage results to the party whose name he has handed in to be dealt with, he should respond in damages, irrespective of the rules of law governing mere libelous publications.

In condemning the practice as calculated to deprive the debtor of the protection given him by the exemption statutes, the court further said:

> The association in question ruthlessly ignored both the policy and the letter of this law. By it there was allowed to the defendant neither the opportunity to allege and prove a defense nor the right of an impartial trial by jury, and the exemptions as to which the holder of the claim had no right, either equitable or legal, were absolutely denied the so-called "defendant." The holder of the claim, by the payment of $10 in advance and thereafter $4 annually, became a privileged member of the self-constituted society, which was at once the plaintiff, the judge, the jury and the executive officer, before which the alleged defendant had not even the poor privilege of being heard.

In Colorado the statute against blacklisting makes a special exemption in favor of any merchant or professional man, or any association of the same, maintaining or publishing a list concerning the credit or financial responsibility of any person or persons dealing with him or them on credit.[3]

In equity, too, relief has been denied the injured debtor in the absence of statute.[4] And even in a suit by the Government against the meat packers, that portion of the decree which restrained the defendants from violating the Sherman Law by "establishing and maintaining rules for the giving of credit to dealers in meats, the effect of which rules will be to restrict competition," was expressly so qualified as not to prohibit the defendants from "establishing and maintaining rules for the giving of credit to dealers where such rules in good faith are calculated solely to protect the defendants against dishonest or irresponsible dealers."[5]

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[1] Heim Brewing Co. *v.* Belinder, 97 Mo. App., 64 (1902).
[2] Masters *v.* Lee, 39 Nebr., 574 (1894).
[3] Colorado R. S. (1908), sec. 401.
[4] Russell *v.* New York Produce Exchange, 58 N. Y. Supp., 842 (1899).
[5] Swift & Co. *v.* United States, 196 U. S., 375 (1906).

Where the practice is conducted by a corporation which has no charter authority for the purpose, and there is a statute authorizing the courts to inquire into the validity of corporate acts at the instance of private parties, relief has been accorded to the injured debtors.[1]

Section 28. Conclusion.

The foregoing discussion of trade association activities indicates their wide scope and varied character. The general purposes professed are in most cases laudable; not only beneficial to their members, but also in some cases promotive of the public welfare. Moreover, concerning many of their professed activities, so far as they are practiced in a bona fide manner, there can be no question as to their legality; for example, their activities in standardizing materials and products, in devising more reliable cost accounting methods, in communicating technical industrial information, in maintaining railroad traffic bureaus, in organizing mutual insurance for members, in advocating legislative policies, and in promoting friendly social intercourse.

An activity which is in itself innocent may be perverted, however, to become the basis for unlawful acts. Thus, the lawful practice of interchange of information as to the output of an industry and the extent of the absorption of the product by the market, or the prices received for the product, might be used as a cloak to conceal the real purpose of an agreement to limit output or fix prices. The courts have clearly condemned this practice, as shown above, and most of the other forms of combination practiced by associations which are unlawful have been made plain in the preceding sections of this chapter. While it is not possible for the courts to lay down detailed rules concerning what is lawful and what is unlawful, which will meet every possible variation in association activity, their decisions have been generally clear enough to guide the great majority who are trying to obey rather than to evade the law.

Evasion or subterfuge in any case is likely to prove of little avail if the true facts are made plain. Speaking of the Sherman Anti-Trust Act, the Supreme Court stated in the Tobacco Case[2] that it embraced "every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed;" and declared, further, that "there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by indirection the prohibitions of the statute."

[1] Hartnett *v.* Plumbers' Supply Association, 169 Mass., 229 (1897); Arbour *v.* Pittsburg Association, 35 Pa. County Rep., 595 (1907).

[2] U. S. *v.* American Tobacco Co., 221 U. S., 106, 181 (1911).

EXHIBITS.

EXHIBIT A.—CANADIAN COMBINES INVESTIGATION ACT, 1910.

(AN ACT TO PROVIDE FOR THE INVESTIGATION OF COMBINES, MONOPOLIES, TRUSTS, AND MERGERS.)

His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. This Act may be cited as "The Combines Investigation Act."

INTERPRETATION.

2. In this Act, unless the context otherwise requires,—

(*a*) "application" means an application to a judge for an order directing an investigation under the provisions of this Act;

(*b*) "Board" means a Board of Investigation established under the provisions of this Act;

(*c*) "combine" means any contract, agreement, arrangement or combination which has, or is designed to have, the effect of increasing or fixing the price or rental of any article of trade or commerce or the cost of the storage or transportation thereof, or of the restricting competition in or of controlling the production, manufacture, transportation, storage, sale or supply thereof, to the detriment of consumers or producers of such article of trade or commerce, and includes the acquisition, leasing or otherwise taking over, or obtaining by any person to the end aforesaid, of any control over or interest in the business, or any portion of the business, of any other person, and also includes what is known as a trust, monopoly or merger;

(*d*) "Department" means the Department of Labour;

(*e*) "judge" means, in the province of Ontario, any judge of the High Court of Justice; in the province of Quebec, any judge of the Superior Court; in the provinces of Nova Scotia, New Brunswick, British Columbia, Prince Edward Island, Saskatchewan and Alberta, any judge of the Supreme Court; in the province of Manitoba, any judge of the Court of King's Bench, and in the Yukon territory, any judge of the Territorial Court;

(*f*) "Minister" means the Minister of Labour;

(*g*) "order" means an order of a judge under the provisions of this Act;

(*h*) "prescribed" means prescribed by this Act, or by any rule or regulation made thereunder;

(*i*) "Registrar" means the Registrar of Boards of Investigation appointed under this Act.

ADMINISTRATION.

3. The Minister shall have the general administration of this Act.

4. The Governor in Council shall appoint a Registrar of Boards of Investigation, who shall have the powers and perform the duties prescribed.

(2.) The office of Registrar may be held either separately or in conjunction with any other office in the public service, and in the latter case the Registrar may, if the Governor in Council thinks fit, be appointed by reference to such other office, whereupon the person who for the time being holds such office or performs its duties shall, by virtue thereof and without thereby being entitled to any additional remuneration, be the Registrar.

ORDER FOR INVESTIGATION.

5. Where six or more persons, British subjects resident in Canada and of full age, are of opinion that a combine exists, and that prices have been enhanced or competition restricted by reason of such combine, to the detriment of consumers or producers, such persons may make an application to a judge for an order directing an investigation into such alleged combine.

(2.) Such application shall be in writing addressed to the judge, and shall ask for an order directing an investigation into the alleged combine, and shall also ask the judge to fix a time and place for the hearing of the applicants or their representative.

(3.) The application shall be accompanied by a statement setting forth,—

(*a*) The nature of the alleged combine and the persons believed to be concerned therein;

(*b*) The manner in which the alleged combine affects prices or restricts competition, and the extent to which the alleged combine is believed to operate to the detriment of consumers or producers;

(*c*) The names and addresses of the parties making the application and the name and address of one of their number or of some other person whom they authorize to act as their representative for the purposes of this Act and to receive communications and conduct negotiations on their behalf.

(4.) The application shall also be accompanied by a statutory declaration from each applicant declaring that the alleged combine operates to the detriment of the declarant as a consumer or producer, and that to the best of his knowledge and belief the combine alleged in the statement exists and that such combine is injurious to trade or has operated to the detriment of consumers or producers in the manner and to the extent described, and that it is in the public interest that an investigation should be had into such combine.

6. Within thirty days after the judge receives the application he shall fix a time and place for hearing the applicants and shall send due notice, by registered letter, to the representative authorized by the statement to receive communications on behalf of the applicants. At such hearing the applicants may appear in person or by their representative or by counsel.

7. If upon such hearing the judge is satisfied that there is reasonable ground for believing that a combine exists which is injurious to

trade or which has operated to the detriment of consumers or producers, and that it is in the public interest that an investigation should be held, the judge shall direct an investigation under the provisions of this Act; or if not so satisfied, and the judge is of opinion that in the circumstances an adjournment should be ordered, the judge may adjourn such hearing until further evidence in support of the application is given, or he may refuse to make an order for an investigation.

(2.) The judge shall have all the powers vested in the court of which he is a judge to summon before him and enforce the attendance of witnesses, to administer oaths, and to require witnesses to give evidence on oath or on solemn affirmation (if they are persons entitled to affirm in civil matters), and to produce such books, papers or other documents or things as the judge deems requisite.

8. The order of the judge directing an investigation shall be transmitted by him to the Registrar by registered letter, and shall be accompanied by the application, the statement, a certified copy of any evidence taken before the judge, and the statutory declarations. The order shall state the matters to be investigated, the names of the persons alleged to be concerned in the combine, and the names and addresses of one or more of their number with whom, in the opinion of the judge, the Minister should communicate in order to obtain the recommendation for the appointment of a person as a member of the Board as hereinafter provided.

Appointment of Boards.

9. Upon receipt by the Registrar of the order directing an investigation the Minister shall forthwith proceed to appoint a Board.

10. Every Board shall consist of three members, who shall be appointed by the Minister under his hand and seal of office.

11. Of the three members of the Board one shall be appointed on the recommendation of the persons upon whose application the order has been granted, one on the recommendation of the persons named in the order as being concerned in the alleged combine, and the third on the recommendation of the two members so chosen.

12. The persons upon whose application the order has been granted and the persons named in the order as being concerned in the alleged combine, within seven days after being requested so to do by the Registrar, may each respectively recommend the name of a person who is willing and ready to act as a member of the Board, and the Minister shall appoint such persons members of the Board.

(2.) For the purpose of obtaining the recommendations referred to in subsection 1 of this section it shall be sufficient, as respects the applicants, for the Registrar to communicate with the representative mentioned in the statement as authorized to receive communications on their behalf, and as respects the persons concerned in the alleged combine it shall be sufficient for the Registrar to communicate with the persons named in the order, as the persons with whom the Minister should communicate for this purpose.

(3.) If the parties, or either of them, fail or neglect to make any recommendation within the said period, or such extension thereof as the Minister, on cause shown, grants, the Minister shall, as soon there-

after as possible, select and appoint a fit person or persons to be a member or members of the Board.

(4.) The two members so appointed may, within seven days after their appointment, recommend the name of a judge of any court of record in Canada who is willing and ready to act as a third member of the Board, and the Minister shall appoint such judge as a member of the Board, and if they fail or neglect to make a recommendation within the said period, or such extension thereof as the Minister on cause shown grants, the Minister shall, as soon thereafter as possible, select and appoint a judge of any court of record in Canada to be the third member of the Board.

(5.) The third member of the Board shall be its chairman.

(6.) A vacancy in the membership of a Board shall be filled in the same manner as an original appointment is made.

13. No person shall act as a member of the Board who is one of the applicants for the Board or who has any direct pecuniary interest in the alleged combine that is the subject of investigation by such Board, or who is not a British subject.

14. As soon as possible after all the members of the Board have been appointed by the Minister, the Registrar shall notify the parties of the names of the chairman and other members of the Board.

15. Before entering upon the exercise of the functions of their office the members of the Board shall take the following oath:—

I, ———, do solemnly swear,—

That I will truly, faithfully and impartially perform my duties as a member of the Board appointed to investigate ———.

That I am a British subject.

That I have no direct pecuniary interest in the alleged combine that is to be the subject of investigation.

That I have not received nor will I accept either directly or indirectly any perquisite, gift, fee or gratuity from any person in any way interested in any matter or thing to be investigated by the Board.

That I am not immediately connected in business with any of the parties applying for this investigation, and am not acting in collusion with any person herein.

16. The Department may provide the Board with a stenographer and such clerical and other assistance as to the Minister appears necessary for the efficient carrying out of the provisions of this Act. The Department shall also repay any reasonable and proper disbursements made or authorized and certified by the judge who grants the order directing the investigation.

17. Upon the appointment of the Board the Registrar shall forward to the chairman copies of the application, statement, evidence, if any, taken before the judge, and order for investigation, and the Board shall forthwith proceed to deal with the matters referred to therein.

Inquiry and Report.

18. The Board shall expeditiously, fully and carefully inquire into the matters referred to it and all matters affecting the merits thereof, including the question of whether or not the price or rental of any article concerned has been unreasonably enhanced, or competition in the supply thereof unduly restricted, in consequence of a combine,

and shall make a full and detailed report thereon to the Minister, which report shall set forth the various proceedings and steps taken by the Board for the purpose of fully and carefully ascertaining all the facts and circumstances connected with the alleged combine, including such findings and recommendations as, in the opinion of the Board, are in accordance with the merits and requirements of the case.

(2) In deciding any question that may affect the scope or extent of the investigation, the Board shall consider what is required to make the investigation as thorough and complete as the public interest demands.

19. The Board's report shall be in writing, and shall be signed by at least two of the members of the Board. The report shall be transmitted by the chairman to the Registrar, together with the evidence taken at such investigation certified by the chairman, and any documents and papers remaining in the custody of the Board. A minority report may be made and transmitted to the Registrar by any dissenting member of the Board.

20. Upon receipt of the Board's report and of the minority report, if any, a copy thereof shall be sent free of charge to the parties and to the representative of any newspaper in Canada who applies therefor, and the report and minority report, if any, shall also be published without delay in *The Canada Gazette*. The Minister may distribute copies of the report, and of any minority report, in such manner as to him seems most desirable, as a means of securing a compliance with the Board's recommendations. The Registrar shall, upon payment of such fees as may be prescribed, supply a certified copy of any report or minority report to any person applying for it.

21. Whenever, from or as a result of an investigation under the provisions of this Act, or from or as a result of a judgment of the Supreme Court or Exchequer Court of Canada or of any superior court, or circuit, district or county court in Canada, it appears to the satisfaction of the Governor in Council that with regard to any article there exists any combine to promote unduly the advantage of the manufacturers or dealers at the expense of the consumers, and if it appears to the Governor in Council that such disadvantage to the consumer is facilitated by the duties of customs imposed on the article, or on any like article, the Governor in Council may direct either that such article be admitted into Canada free of duty or that the duty thereon be reduced to such amount or rate as will, in the opinion of the Governor in Council, give the public the benefit of reasonable competition.

22. In case the owner or holder of any patent issued under the Patent Act has made use of the exclusive rights and privileges which, as such owner or holder he controls, so as unduly to limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article which may be a subject of trade or commerce, or so as to restrain or injure trade or commerce in relation to any such article, or unduly to prevent, limit or lessen the manufacture or production of any article or unreasonably to enhance the price thereof, or unduly to prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation, storage or supply of any article, such patent shall be liable to be revoked. And, if a Board reports that a patent has been so made use of, the

Minister of Justice may exhibit an information in the Exchequer Court of Canada praying for a judgment revoking such patent, and the court shall thereupon have jurisdiction to hear and decide the matter and to give judgment revoking the patent or otherwise as the evidence before the court may require.

23. Any person reported by a Board to have been guilty of unduly limiting the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article which may be a subject of trade or commerce; or of restraining or injuring trade or commerce in relation to any such article; or of unduly preventing, limiting or lessening the manufacture or production of any such article; or of unreasonably enhancing the price thereof; or of unduly preventing or lessening competition in the production, manufacture, purchase, barter, sale, transportation, storage or supply of any such article, and who thereafter continues so to offend, is guilty of an indictable offence and shall be liable to a penalty not exceeding one thousand dollars and costs for each day after the expiration of 10 days, or such further extension of time as in the opinion of the Board may be necessary, from the date of the publication of the report of the Board in *The Canada Gazette* during which such person so continues to offend.

Sittings of Board.

24. The sittings of the Board shall be held at such times and places as are fixed by the chairman, after consultation with the other members of the Board, and the parties shall be notified by the chairman as to the times and places at which sittings are to be held: Provided that, so far as practicable, the Board shall sit in the locality within which the subject-matter of the proceedings before it arose.

25. The proceedings of the Board shall be conducted in public, but the Board may order that any portion of the proceedings shall be conducted in private.

26. The decision of any two of the members present at a sitting of the Board shall be the decision of the Board.

27. The presence of the chairman and at least one other member of the Board shall be necessary to constitute a sitting of the Board.

28. In case of the absence of any one member from a meeting of the Board the other two members shall not proceed, unless it is shown that the absent member has been notified of the meeting in ample time to admit of his attendance.

29. Any party to an investigation may appear before the Board in person or may be represented by any other person or persons, or, with the consent of the Board, may be represented by counsel.

30. Whenever in the opinion of the Minister the public interest so requires, the Minister may apply to the Minister of Justice to instruct counsel to conduct the investigation before a Board, and upon such application the Minister of Justice may instruct counsel accordingly. The fees and expenses allowed to such counsel by the Minister of Justice shall be paid out of such appropriations as are made by Parliament to provide for the cost of administering this act.

31. If, in any proceedings before the Board, any person wilfully insults any member of the Board, or wilfully interrupts the pro-

ceedings, or without good cause refuses to give evidence, or is guilty in any other manner of any wilful contempt in the face of the Board, any officer of the Board, or any constable may take the person offending into custody and remove him from the precincts of the Board, to be detained in custody until the conclusion of that day's sitting of the Board, and the person so offending shall be liable, upon summary conviction, to a penalty not exceeding one hundred dollars.

Witnesses and Evidence.

32. For the purposes of an investigation the Board shall have all powers which are vested in any court of record in civil cases for the following purposes, namely: the summoning of witnesses before it, and enforcing their attendance from any part of Canada, of administering oaths, and of requiring witnesses to give evidence on oath or on solemn affirmation (if they are persons entitled to affirm in civil matters) and to produce such books, papers or other documents or things as the Board deems requisite to the full investigation of the matters into which it is inquiring.

(2.) Any member of the Board may administer an oath.

(3.) Summonses to witnesses and all other orders, process and proceedings shall be signed by the chairman.

33. All books, papers and other documents or things produced before the Board, whether voluntarily or in pursuance of summons, may be inspected by the Board, and also by such parties as the Board allows.

34. Any party to the proceedings shall be competent and may be compelled to give evidence as a witness.

35. Every person who is summoned and duly attends as a witness shall be entitled to an allowance for attendance and traveling expenses according to the scale in force with respect to witnesses in civil suits in the superior courts of the province in which the inquiry is being conducted.

36. If any person who has been duly served with a summons and to whom at the time of service payment or tender has been made of his reasonable traveling expenses according to the aforesaid scale, fails to attend or to produce any book, paper or other document or thing as required by his summons, he shall, unless he shows that there was good and sufficient cause for such failure, be guilty of an offence and liable upon summary conviction to a penalty not exceeding one hundred dollars.

37. The Board may, with the consent of the Minister, employ competent experts to examine books or official reports, and to advise it upon any technical or other matter material to the investigation, but the information obtained therefrom shall not, except in so far as the Board deems it expedient, be made public, and such parts of the books, papers or other documents as in the opinion of the Board are not material to the investigation may be sealed up.

Remuneration and Expenses of Board.

38. The members of a Board shall be remunerated for their services as follows:—

(*a*) To the two members first appointed an allowance of five dollars each per day for a time not exceeding three days during which

they may be actually engaged in selecting the third member of the Board.

(*b*) To each member an allowance at the rate of twenty dollars for each day's sitting of the Board.

39. Each member of the Board shall be entitled to his actual and necessary travelling expenses and an allowance of ten dollars per day for each day that he is engaged in travelling from or to his place of residence for the purpose of attending or after having attended a meeting of the Board.

40. No member of the Board shall accept, in addition to his travelling expenses and allowances as a member of the Board, any perquisite, gift, fee or gratuity of any kind from any person in any way interested in any matter or thing that is being investigated by the Board. The acceptance of any such perquisite, gift, fee or gratuity by any member of the Board shall be an offence, and shall render such member liable upon summary conviction to a fine not exceeding one thousand dollars, and he shall thereafter be disqualified to act as a member of any Board.

41. All expenses of the Board, including expenses for transportation incurred by the members thereof or by persons under its order in making investigations under this Act, salaries of employees and agents, and fees and travelling expenses of witnesses, shall be allowed and paid upon the presentation of itemized vouchers therefor, approved and certified by the chairman of the Board, which vouchers shall be forwarded by the chairman to the Registrar. The chairman shall also forward to the Registrar a certified and detailed statement of the sittings of the Board, and of the members present at each of such sittings.

Miscellaneous.

42. No proceedings under this Act shall be deemed invalid by reason of any defect of form or any technical irregularity.

43. Evidence of a report of a Board may be given in any court by the production of a copy of *The Canada Gazette* purporting to contain a copy of such report, or by the production of a copy of the report purporting to be certified by the Registrar to be a true copy.

44. The Minister shall determine the allowance or amounts to be paid to all persons, other than the members of a Board employed by the Government or any Board, including the secretaries, clerks, experts, stenographers or other persons performing any services under the provisions of this Act.

45. The Governor in Council may make such regulations, not inconsistent with this Act, as to him seem necessary for carrying out the provisions of this Act and for the efficient administration thereof.

(2.) Such regulations shall be published in *The Canada Gazette*, and upon being so published they shall have the same force as if they formed part of this Act.

(3.) The regulations shall be laid before both Houses of Parliament within fifteen days after such publication if Parliament is then sitting, and if Parliament is not then sitting then within fifteen days after the opening of the next session thereof.

46. The Minister shall lay before Parliament, within the first fifteen days of the then next session, an annual report of the proceedings under this Act.

47. Subsection 1 of section 12 of The Customs Tariff, 1907, is repealed.

48. This Act shall not be construed to repeal, amend or in any way affect The Trade Unions Act, chapter 125 of the Revised Statutes, 1906.

SCHEDULE.

[FORM 1.]

APPLICATION FOR ORDER DIRECTING AN INVESTIGATION.

"The Combines Investigation Act."

(Section 5.)

Dated at ——— this —— day of ———, 191—.

IN THE MATTER of an alleged combine [*here state shortly the nature of the combine*].

To the Honourable [*here insert the name of the judge*], a Judge [*or*, Chief Justice *as the case may be*] of the [*here insert the title of the court*].

The undersigned are of opinion that a combine exists [*here state shortly the nature of the alleged combine*] and that prices have been enhanced [*or*, competition has been restricted by such combine, *as the case may be*] to the detriment of consumers [*or*, producers, *as the case may be*].

The undersigned therefore apply for an order under "The Combines Investigation Act" directing an investigation into such alleged combine.

[Here state—(*a*) *the nature of the alleged combine and the persons believed to be concerned therein; and,* (*b*) *the manner in which the alleged combine affects prices or restricts competition, and the extent to which the alleged combine is believed to operate to the detriment of consumers or producers, as the case may be.*]

STATEMENT ACCOMPANYING APPLICATION FOR ORDER.

Dated at ——— this —— day of ———, 19—.

The undersigned hereby authorize ——— of ——— [*give name and place of residence*] to act as our representative for the purposes of "The Combines Investigation Act," and to receive communications and conduct negotiations on our behalf.

The names and addresses of the persons applying for the aforesaid order are as follows:

Names.	Addresses.

STATUTORY DECLARATION ACCOMPANYING APPLICATION FOR ORDER.[1]

CANADA:

Province of ——, *To Wit:*

I, ——, of the —— of —— in the —— of —— do solemnly declare:—

1. That the alleged combine operates to my detriment as a consumer [*or*, producer, *as the case may be*].

2. That to the best of my knowledge and belief the combine alleged in the foregoing statement exists and that such combine is injurious to trade [*or*, has operated to the detriment of consumers, *or*, producers, *as the case may be*] in the manner and to the extent described.

[1] A declaration as above must be made by each applicant.

3. That it is in the public interest that an investigation should be had into such combine.

And I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath, and by virtue of The Canada Evidence Act.

Declared before me at _____ in the county of _____ this ____ day of _____, 19__.

[FORM 2.]

ORDER DIRECTING INVESTIGATION.

"The Combines Investigating Act."

(Section 7.)

IN THE MATTER of the application of [*here insert the names of applicants*] dated the ____ day of _____, 19__, for an order directing an investigation under "The Combines Investigation Act" into an alleged combine [*here state shortly the nature of the combine*].

I, the Honourable _____, a Judge [*or*, Chief Justice, *as the case may be*] of [*here insert the name of court*], after having read the application of [*names of applicants*], dated the ____ day of _____, 19__, the statement and statutory declarations accompanying the same and the evidence produced by the said applicants, am satisfied that there is reasonable ground for believing that a combine exists [*here describe nature of combine*], which is injurious to trade [*or*, which has operated to the detriment of consumers, *or*, producers, *as the case may be*], and that it is in the public interest that an investigation should be held, and I do therefore direct that an investigation be held, under the provisions of the said Act, into the following matters, that is to say: [*Here set out the matters to be investigated.*]

The names of the persons alleged to be concerned in the alleged combine are [*here insert names and addresses*] and I am of opinion that the Minister of Labour should communicate with [*here insert the name or names with, in each case, the address*] in order to obtain the recommendation for the appointment of a person as a member of the Board of Investigation on behalf of those concerned in the said alleged combine.

Dated at _____ this ____ day of _____, 19__.

EXHIBIT B.—AUSTRALIAN INDUSTRIES PRESERVATION ACT, 1906–1910.

[As amended by the acts of 1907, 1909, and 1910.]

(AN ACT FOR THE PRESERVATION OF AUSTRALIAN INDUSTRIES, AND FOR THE REPRESSION OF DESTRUCTIVE MONOPOLIES.)

[Assented to 24th September, 1906.]

Be it enacted by the King's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia, as follows:

PART I.—PRELIMINARY.

1. This Act may be cited as the Australian Industries Preservation Act, 1906–1910.

2. This Act is divided into parts as follows: Part I, Preliminary; Part II, Repression of Monopolies; Part III, Prevention of Dumping.

3. In this Act, unless the contrary intention appears—

"Commercial Trust" includes a combination, whether wholly or partly within or beyond Australia, of separate and independent persons (corporate or unincorporate) whose voting power or determina-

tions are controlled or controllable by—(*a*) the creation of a trust as understood in equity, or of a corporation, wherein the trustees or corporation hold the interests, shares, or stock of the constituent persons; or (*b*) an agreement; or (*c*) the creation of a board of management or its equivalent; or (*d*) some similar means; and includes any division, part, constituent person, or agent of a Commercial Trust.

"Inadequate remuneration for labour" includes inadequate pay or excessive hours or any terms or conditions of labour or employment unduly disadvantageous to workers;

"Person" includes corporation and firm and a Commercial Trust.

"The Comptroller-General" means the Comptroller-General of Customs.

"Answer questions" means that the person on whom the obligation of answering questions is cast shall to the best of his knowledge, information and belief truly answer all questions on the subject mentioned that the Comptroller-General or the person named by him shall ask.

"Produce documents" means that the person on whom the obligation to produce documents is cast shall to the best of his power produce to the Comptroller-General or to the person named by him all documents relating to the subject-matter mentioned.

Part II.—Repression of Monopolies.

4.—(1) Any person who, either as principal or as agent, makes or enters into any contract, or is or continues to be a member of or engages in any combination, in relation to trade or commerce with other countries or among the States—(*a*) in restraint of or with intent to restrain trade or commerce; or (*b*) to the destruction or injury of or with intent to destroy or injure by means of unfair competition, any Australian industry, the preservation of which is advantageous to the Commonwealth, having due regard to the interests of producers, workers, and consumers, is guilty of an offence.

Penalty: Five hundred pounds, or, in the case of a continuing offence, Five hundred pounds for each day during which the offence continues.

(2) Every contract made or entered into in contravention of this section shall be absolutely illegal and void.

(3) It shall be a defence to a proceeding for an offence under paragraph (*a*) of subsection (1) of this section, and an answer to an allegation that a contract was made or entered into in restraint of, or with intent to restrain, trade or commerce, if the party alleged to have contravened this section proves—(*a*) that the matter or thing alleged to have been done in restraint of, or with intent to restrain, trade or commerce, was not to the detriment of the public, and (*b*) that the restraint of trade or commerce effected or intended was not unreasonable.[1]

* * * * * * *

6.—(1) For the purpose of section four and section ten of this Act, unfair competition means competition which is unfair in the

[1] Section 5 of this Act was repealed by section 3 of the Australian Industries Preservation Act (No. 26) of 1909.

circumstances; and in the following cases the competition shall be deemed to be unfair unless the contrary is proved:—

(*a*) if the defendant is a Commercial Trust;

(*b*) if the competition would probably or does in fact result in an inadequate remuneration for labour in the Australian industry;

(*c*) if the competition would probably or does in fact result in creating substantial disorganisation in Australian industry or throwing workers out of employment;

(*d*) if the defendant, with respect to any goods or services which are the subject of the competition, gives, offers, or promises to any person any rebate, refund, discount, or reward upon condition that that person deals, or in consideration of that person having dealt, with the defendant to the exclusion of other persons dealing in similar goods or services.

(2) In determining whether the competition is unfair, regard shall be had to the management, the processes, the plant, and the machinery employed or adopted in the Australian industry affected by the competition being reasonably efficient, effective, and up-to-date.

7.—(1) Any person who monopolises or attempts to monopolise, or combines or conspires with any other person to monopolise, any part of the trade or commerce with other countries or among the States, is guilty of an indictable offence.

Penalty: Five hundred pounds for each day during which the offence continues, or one year's imprisonment, or both; or, in the case of a corporation, One thousand pounds for each day during which the offence continues.

(2) Every contract made or entered into in contravention of this section shall be absolutely illegal and void.

(3) The Attorney-General may elect, instead of proceeding by indictment for an offence against this section, to institute proceedings in the High Court by way of civil action for the recovery of the pecuniary penalties for the offence; in which case the action shall be tried before a Justice of that Court without a jury.

7A.—(1) Any person who, in relation to trade or commerce with other countries or among the States, either as principal or agent, in respect of dealings in any goods or services gives offers or promises to any other person any rebate, refund, discount, concession, or reward, for the reason, or upon the condition, express or implied, that the latter person—(*a*) deals, or has dealt, or will deal, or intends to deal exclusively with any person, either in relation to any particular goods or services or generally; or (*b*) deals, or has dealt, or will deal, or intends to deal, exclusively with members of a Commercial Trust, either in relation to any particular goods or services or generally; or (*c*) does not deal, or has not dealt, or will not deal, or does not intend to deal, with certain persons, either in relation to any particular goods or services or generally; or (*d*) is or becomes a member of a Commercial Trust, is guilty of an offence.

Penalty: Five hundred pounds.

(2) Every contract made or entered into in contravention of this section shall be absolutely illegal and void.

(3) It shall be a defense to a prosecution under this section, and an answer to an allegation that a contract was made or entered into in contravention of this section, if the party alleged to have contravened this section proves that the matter or thing alleged to have

been done in contravention of this section was not to the detriment of the public, and did not constitute competition which was unfair in the circumstances, and was not destructive of or injurious to any Australian industry.

7B. Any person who, in relation to trade and commerce with other countries or among the States, either as principal or agent, refuses either absolutely or except upon disadvantageous conditions to sell or supply to any other person any goods or services for the reason that the latter person—(*a*) deals, or has dealt, or will deal, or intends to deal, with any person; or (*b*) deals, or has dealt, or will deal, or intends to deal, with persons who are not members of a Commercial Trust; or (*c*) is not a member of a Commercial Trust, is guilty of an offence.

Penalty: Five hundred pounds.[1]

* * * * * * *

9. Whoever aids, abets, counsels, or procures, or by act or omission is in any way, directly or indirectly, knowingly concerned in or privy to—(*a*) the commission of any offence against this part of this Act; or (*b*) the doing of any act outside Australia which would, if done within Australia, be an offence against this part of this Act, shall be deemed to have committed the offence.

Penalty: Five hundred pounds.

10. (1) The Attorney-General, or any person thereto authorized by him, may institute proceedings in the High Court to restrain by injunction after hearing and determining the merits and not by way of interlocutory order the carrying out of any contract made or entered into after the commencement of this Act or any combination which—(*a*) is in restraint of trade or commerce; or (*b*) is destructive or injurious, by means of unfair competition, to any Australian industry the preservation of which is advantageous to the Commonwealth, having due regard to the interests of producers, workers, and consumers.

Provided, that this section shall only apply to contracts or combinations in relation to commerce with other countries or among the States.

(2) On the conviction of any person for an offence under this part of this Act the Justice before whom the trial takes place shall, upon application by or on behalf of the Attorney-General or any person thereto authorized by him, grant an injunction restraining the convicted person and his servants and agents from the repetition or continuance of the offence of which he has been convicted.

10A.—(1) Any person who does any act or thing in disobedience of an injunction granted under this part of this Act shall be guilty of an offence.

Penalty: Five hundred pounds for each day during which the offence continues.

(2) This section shall not be deemed to derogate from the power of the High Court, apart from this section, to enforce obedience to the injunction.

11.—(1) Any person who is injured in his person or property by any other person, by reason of any act or thing done by that other per-

[1] Section 8 was repealed by section 6 of the Australian Industries Preservation Act (No. 26) of 1909.

son in contravention of this part of this Act, or by reason of any act or thing done in contravention of any injunction granted under this part of this Act may, in the High Court, before a Justice without a jury, sue for and recover treble damages for the injury.

(2) No person shall, in any proceeding under this section, be excused from answering any question put either *vivâ voce* or by interrogatory, or from making any discovery of documents, on the ground that the answer or discovery may criminate or tend to criminate him; but his answer shall not be admissible in evidence against him in any criminal proceeding other than a prosecution for perjury.

12. The jury panel for the trial of any offence against this part of this Act, or for the trial of any action or issue under this part of this Act, shall be taken from the list of special jurors (if any) in the State or part of the Commonwealth in which the trial takes place.

13.—(1) Proceedings for the recovery of pecuniary penalties for offences against this part of this Act (other than indictable offences or offences against section fifteen B, section fifteen C, or section fifteen E) shall be instituted in the High Court by way of civil action and shall be tried before a Justice of that Court without a jury.

(2) Any offence against this part of this Act committed by a person who has previously been convicted of any offence against this part of this Act shall be an indictable offence, punishable on conviction by a penalty not exceeding Five hundred pounds, or imprisonment for any term not exceeding one year, or both; in the case of a corporation, by a penalty not exceeding One thousand pounds.

14.—(1) No proceeding for an indictable offence or for the recovery of penalties shall be instituted under this part except by the Attorney-General or some person authorized by him.

(2) No other proceeding shall be instituted under this part without the written consent of the Attorney-General.

14A. In any proceeding for an offence against this part of this Act, and indictment, information, statement of claim, conviction, warrant, or other process shall suffice if the offence is set forth as nearly as may be in the words of this Act.

14B. No person shall, in any proceeding for an offence against this part of this Act, be excused from answering any question, put either *vivâ voce* or by interrogatory, or from making any discovery of documents, on the ground that the answer or discovery may tend to criminate him or make him liable to a penalty; but his answer shall not be admissible in evidence against him in any civil or criminal proceeding other than a proceeding for an offence against this Act or a prosecution for perjury.

14C. In any proceeding for an offence against this part of this Act, wherein a combination or conspiracy or attempted combination or conspiracy in contravention of this Act is alleged, any book. document, paper or writing containing—(*a*) any minute, note, record or memorandum of any proceeding at any meeting of the persons or any of the persons alleged to have been parties or privy to the combination, conspiracy or attempt, or (*b*) any entry purporting to be a copy of or extract from any such book, document, paper or writing, shall, upon proof that it was produced by or came from the custody of those persons or any of them, or of a responsible officer or a representative of those persons or any of them,—(i) be admissible in evi-

dence against those persons; and (ii) be evidence that the matter and things thereby appearing to have been done by those persons, or any of them, were so done, and that any person thereby appearing to have been present at the meeting was so present.

14D. In any proceeding for an offence against this part of this Act, any book, letter, document, paper or writing, or anything purporting to be a copy of, or extract from, any book, letter, document, paper or writing, containing any reference to any matter or thing alleged to be done in contravention of this Act, shall, upon proof that it was produced by or came from the custody of a person charged with the offence, or a responsible officer or a representative of that person,—(*a*) be admissible in evidence against that person; and (*b*) be evidence of the matters and things thereby appearing, and that the book, letter, document, paper or writing (or, in the case of a copy, that the original thereof) was written, signed, despatched, and received by the persons by whom it purports to have been written, signed, despatched, and received, and that any such copy or extract is a true copy of, or extract from, the original of or from which it purports to be a copy or extract.

15.—(1) Any person party to a contract or member of a combination or in any way concerned in carrying out the contract or the objects of the combination may—(*a*) lodge with the Attorney-General a statutory declaration by himself, or in the case of a corporation by some one approved of in that behalf by the Attorney-General, setting forth truly, fully and completely the terms and particulars of the contract, or the purposes, objects and terms of agreement or constitution of the combination, as the case may be, and an address in Australia to which notices may be sent by the Attorney-General; and (*b*) publish the statutory declaration in the *Gazette*.

(2) The Attorney-General may at any time send notice to the person above-mentioned (hereinafter called the declarant), to the address mentioned in the statutory declaration, that he considers the contract or combination likely to restrain trade or commerce to the detriment of the public, or to destroy or injure an Australian industry by unfair competition.

(3) In any proceeding against the declarant in respect of any offence against section 4 of this Act, alleged to have been committed by him in relation to the contract or combination after the time the statutory declaration has been lodged and published, and before any notice as aforesaid has been sent to him by the Attorney-General, it shall be deemed (but as regards the declarant only and not as regards any other person) that the declarant had no intent to contravene the provisions of the section, if he proves that the statutory declaration contains a true, full and complete statement of the terms and particulars of the contract, or the purposes, objects, and terms of agreement or constitution of the combination, as the case may be, at the date of the statutory declaration and at the date of the alleged offence.

15A. In any prosecution for an offence against sections 4, 7, 7A, 7B, or 9 of this Act the averments of the prosecutor contained in the information, declaration or claim shall be deemed to be proved in the absence of proof to the contrary, but so that—(*a*) the averment in the information of intent shall not be deemed sufficient to prove such

intent, and (*b*) in all proceedings for an indictable offence the guilt of the defendant must be established by evidence.

15B.—(1) If the Comptroller-General believes that an offence has been committed against this part of this Act, or if a complaint has been made in writing to the Comptroller-General that an offence has been committed against this part of this Act and the Comptroller-General believes that the offence has been committed, he may by writing under his hand require any person whom he believes to be capable of giving any information in relation to the alleged offence to answer questions and to produce documents to him or to some person named by him in relation to the alleged offence.

(2) No person shall refuse or fail to answer questions or produce documents when required to do so in pursuance of this section.

Penalty: Fifty pounds.

(3) The Comptroller-General or any person to whom any documents are produced in pursuance of this section may take copies of or extracts from those documents.

(4) No person shall be excused from answering any questions or producing any documents when required to do so under this section on the ground that the answer to the question or the production of the document might tend to criminate him or make him liable to a penalty; but his answer shall not be admissible in evidence against him in any civil or criminal proceeding other than a proceeding for an offence against this part of this Act.

15C.—(1) Whenever a complaint on oath has been made in writing to the Comptroller-General that any person or any foreign corporation or any trading or financial corporation formed within the Commonwealth has been guilty of any offence against this part of this Act, the Comptroller-General, if he believes the complaint to be well founded, may, by writing, require any such person or foreign corporation or trading or financial corporation or any member, officer or agent of any such corporation, to produce and hand over to him or to some person appointed by him in writing all books and documents relating to the subject-matter of the complaint and all books and documents of any kind whatsoever wherein any entry or memorandum appears in any way relating to the subject-matter of the complaint.

(2) Every person or foreign corporation, or trading or financial corporation, required by the Comptroller-General as aforesaid to produce to him or to some person appointed by him in writing any books or documents shall forthwith produce and hand over such books or documents accordingly.

Penalty: One hundred pounds.

(3) The Comptroller-General or any person appointed by him in writing may inspect all books and documents produced in pursuance of this section and may make copies of or extracts from those books or documents.

15D. The Comptroller-General may impound or retain any book or document produced to him or to any person so appointed by him in pursuance of the preceding section, but the person or corporation otherwise entitled to such book or document shall in lieu thereof be entitled to a copy certified as correct by the Comptroller-General, and such certified copy shall be receivable in all Courts as evidence and of equal validity with the original. And until such certified copy is

supplied the Comptroller-General may at such times and places as he shall think proper permit such person, or in the case of a corporation any person appointed for the purpose by the corporation, to inspect and take extracts from the books or documents so impounded or retained.

15E. No person shall disclose any information gained by him in the exercise of the powers conferred by the last three preceding sections except —(*a*) to the Attorney-General, or some person authorized by him; (*b*) to the Comptroller-General; (*c*) when giving evidence in any proceeding for an offence against this part of this Act.

Penalty: Fifty pounds.

PART III.—PREVENTION OF DUMPING.

16. In this Part of this Act—

"Justice" means a Justice of the High Court;

"The Comptroller-General" means the Comptroller-General of Customs;

"Imported goods" and "Australian goods" include goods of those classes, respectively, and all parts or ingredients thereof;

"Produced" includes manufactured, and "Producer" includes manufacturer;

"Trade" includes production of every kind;

"Industries" shall not include industries in which in the opinion of the Comptroller-General or Justice as the case may be, the majority of workers do not receive adequate remuneration or are subject to unfair terms or conditions of labour or employment.

17. Unfair competition has in all cases reference to competition with those Australian industries, the preservation of which, in the opinion of the Comptroller-General or a Justice as the case may be, is advantageous to the Commonwealth, having due regard to the interests of producers, workers, and consumers.

18.—(1.) For the purposes of this Part of this Act, competition shall be deemed to be unfair, unless the contrary is proved, if—(*a*) under ordinary circumstances of trade it would probably lead to the Australian goods being no longer produced or being withdrawn from the market or being sold at a loss unless produced at an inadequate remuneration for labour; or (*b*) the means adopted by the person importing or selling the imported goods are, in the opinion of the Comptroller-General or a Justice as the case may be, unfair in the circumstances; or (*c*) the competition would probably or does in fact result in an inadequate remuneration for labour in the Australian industry; or (*d*) the competition would probably or does in fact result in creating any substantial disorganization in Australian industry or throwing workers out of employment; or (*e*) the imported goods have been purchased abroad by or for the importer, from the manufacturer or some person acting for or in combination with him or accounting to him, at prices greatly below their ordinary cost of production where produced or market price where purchased; or (*f*) the imported goods are imported by or for the manufacturer, or some person acting for or in combination with him or accounting to him, and are being sold in Australia at a price which is less than gives the person importing or selling them a fair profit upon their fair foreign

market value, or their fair selling value if sold in the country of production, together with all charges after shipment from the place whence the goods are exported directly to Australia (including Customs duty).

(2.) In determining whether the competition is unfair, regard shall be had to the management, the processes, the plant, and the machinery employed or adopted in the Australian industry affected by the competition being reasonably efficient, effective, and up-to-date.

19.—(1.) The Comptroller-General, whenever he has received a complaint in writing and has reason to believe that any person (hereinafter called the importer), either singly or in combination with any other person within or beyond the Commonwealth, is importing into Australia goods (hereinafter called imported goods) with intent to destroy or injure any Australian industry by their sale or disposal within the Commonwealth in unfair competition with any Australian goods, may certify to the Minister accordingly.

(2.) The certificate of the Comptroller-General shall specify—(*a*) the imported goods; (*b*) the Australian industry and goods; (*c*) the importer; (*d*) the grounds of unfairness in the competition; (*e*) the name, address, and occupation of any person (not being an officer of the public service) upon whose information he may have acted.

(3.) The Comptroller-General may add to his certificate a statement of such other facts as in his opinion ought to be specified to give the importer fair notice of the matters complained of.

(4.) The Comptroller-General shall, before making his certificate, give to the importer an opportunity to show cause why the certificate should not be made and furnish him with a copy of the complaint.

(5.) On receipt of the certificate the Minister may—(*a*) by order in writing refer to a Justice the investigation and determination of the question whether the imported goods are being imported with the intent alleged; and if so, whether the importation of the goods should be prohibited either absolutely or subject to any specified conditions or restrictions or limitations; (*b*) notify in the *Gazette* that the question has been so referred; and (*c*) forward to the Justice a copy of the certificate.

20. From the date of the *Gazette* notice until the publication in the *Gazette* of the determination of the question by the Justice, goods the subject of the investigation, shall not be imported unless the importer—(*a*) gives to the Minister a bond with such sureties as the Minister approves, for such amount (not exceeding the true value of the goods for Customs purposes) as the Minister considers just and reasonable by way of precaution in the circumstances, and conditioned to be void if the Justice determines the question in favor of the importer; or (*b*) gives such other security and complies with such other conditions as the Minister approves; and those goods shall, if imported in contravention of this section, be deemed to be prohibited imports within the meaning of the *Customs Act* 1901, and the provisions of that Act shall apply to the goods accordingly.

21.—(1.) The Justice shall proceed to expeditiously and carefully investigate and determine the matter, and for the purpose of the proceeding shall have power to inquire as to any goods, things, and matters whatsoever which he considers pertinent, necessary, or material.

(2.) For the purpose of the proceeding the Justice shall sit in open Court, and shall have all the powers of a Justice in the exercise of the ordinary jurisdiction of the High Court. He may, if he thinks fit, and shall on the application of either party, state a case for the opinion of the Full Court upon any question of law arising in the proceeding. And he may if he thinks fit, at any stage of the proceeding, refer the investigation and determination of the matter to the Full Court, which shall in that case have all the powers and functions of a Justice under this Part of this Act.

(3.) The certificate of the Comptroller-General shall be *prima facie* evidence of facts by sub-section (2.) of section nineteen of this Act required to be specified therein.

(4.) In addition to the Comptroller-General and the importer the Justice may, if he thinks fit, allow any person interested in importing imported goods to be represented at the investigation.

(5.) The Justice shall be guided by good conscience and the substantial merits of the case, without regard to legal forms or technicalities, or whether the evidence before him is in accordance with the law of evidence or not.

(6.) No person shall in any proceeding before a Justice be excused from answering any question or producing documents on the ground that the answer or production may criminate or tend to criminate him, but his answer shall not be admissible in evidence against him in any criminal proceeding other than a prosecution for perjury.

(7.) The Justice shall forward his determination to the Minister.

(8.) In the case of the following agricultural implements:—Plows of all kinds over 1½ cwt., tine harrows, disk harrows, grain drills, combined grain seed and manure drills, land rollers, cultivators, chaff cutters, seed cleaners, stripper harvesters, and any other implement usually used in agriculture, the Justice shall inquire into and determine the question whether the goods are being imported with the effect of benefiting the primary producers without unfairly injuring any other section of the community of the Commonwealth.

(9.) The determination of the Justice shall be final and conclusive and without appeal, and shall not be questioned in any way.

22.—(1.) Upon the receipt of the determination of the Justice the Minister shall forthwith cause it to be published in the *Gazette*.

(2.) If the Justice determines that the imported goods are being imported with the intent alleged, and that their importation should be prohibited either absolutely or subject to any specified conditions or restrictions or limitations of any kind whatsoever—(*a*) the determination when so published shall have the effect of a proclamation under the *Customs Act* 1901 prohibiting the importation of the goods either absolutely or subject to those conditions or restrictions or limitations as the case may be; and in that case the provisions of that Act shall apply to goods so prohibited; and (*b*) the Justice may by order reduce the amount recoverable under any bond given in pursuance of this Part of this Act to such sum as the importer satisfies him is reasonable and just in the circumstances.

23. The Governor-General may at any time, by proclamation, simultaneously with or subsequently to any prohibition under this part of this Act, rescind in whole or in part, the prohibition or any condition or restriction or limitation on importation imposed thereby.

24. In all cases of prohibition the determination of the Justice and any proclamation affecting the same, shall be laid before both Houses of the Parliament within seven days after the publication in the *Gazette*, or, if the Parliament is not then sitting, within seven days after the next meeting of Parliament.

25. The Justices of the High Court, or a majority of them, may make Rules of Court not inconsistent with this Act, for regulating the proceedings before a Justice under this Part of this Act, and for carrying this Part of this Act into effect.

26.—(1.) Any person who wilfully—(*a*) makes to the Comptroller-General or to any officer of Customs any false statement in relation to any action or proceedings taken or proposed to be taken under this Part of this Act; or (*b*) misleads the Comptroller-General in any particular likely to affect the discharge of his duty under this Act; shall be guilty of an offence.

Penalty: One hundred pounds or twelve months' imprisonment.

(2.) Any person convicted under the last preceding subsection may be ordered by the Justice to whom a question is referred under this Part of this Act to pay the whole or part of the costs incurred by the importer in whose favor the question is determined.

EXHIBIT C.—AUSTRALIAN INTER-STATE COMMISSION ACT, 1912.

(AN ACT RELATING TO THE INTER-STATE COMMISSION.)
[Assented to 24th December, 1912.]

Be it enacted by the King's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia, as follows:

PART I.—PRELIMINARY.

1. This Act may be cited as the Inter-State Commission Act 1912.
2. This Act is divided into Parts, as follows:—
   - Part I.—Preliminary.
   - Part II.—The Inter-State Commission.
   - Part III.—Investigations.
   - Part IV.—Inter-State Traffic.
   - Part V.—Judicial Powers of the Commission.
   - Part VI.—Miscellaneous.
3. In this Act, unless the contrary intention appears—

"Commerce" includes trade and traffic of all descriptions by land or water;

"The Commission" means the Inter-State Commission;

"Commissioner" means a member of the Inter-State Commission;

"Common carrier" includes the Railway Commissioners, and any persons or authorities controlling the railways, ferries, or other carrying agencies, of the Commonwealth or of a State;

"External commerce" means commerce with other countries, and includes all commerce (whether or not under a common control, management, or arrangement, and whether or not by a continuous carriage or shipment) from any place in the Commonwealth to or through another country, or from another country to or through any place in the Commonwealth;

"Inter-State commerce" means commerce among the States, and includes all commerce (whether or not under a common control, management, or arrangement, and whether or not by a continuous carriage or shipment) from one State or Territory of the Commonwealth to or through another State or Territory of the Commonwealth;

"Goods" includes animals of all descriptions:

"Order" includes adjudication, determination, decision and award:

"Party" includes a State, or State authority, being a party:

"Rate" includes any rate, fare, toll, or charge for any service rendered in connexion with the transportation of passengers or goods, or in connexion with the receiving, delivering, storage, or handling of goods:

"State Authority" means any authority constituted under a State:

"State Railway Authority" includes the Railway Commissioners of a State, and any persons or authorities controlling any railways the property of a State:

"The Minister" means the Minister for Trade and Customs:

"Traffic" includes the transportation of passengers and of goods.

PART II.—THE INTER-STATE COMMISSION.

4.–(1.) The Commission shall consist of three members, of whom one shall be of experience in the law. It shall be a body corporate, with perpetual succession and a common seal, and capable of suing and being sued.

(2.) All courts, judges, and persons acting judicially shall take judicial notice of the seal of the Commission affixed to any document or notice, and shall presume that it was duly affixed.

5.–(1.) The Governor-General shall, as soon as conveniently practicable, appoint three persons to be Commissioners, and on the happening of any vacancy in the office of Commissioner the Governor-General shall appoint a person to the vacant office.

(2.) Every such appointment shall, subject to the Constitution, be for a term of seven years; and every person so appointed shall on the expiration of his term of office be eligible for re-appointment.

(3.) In case of the illness, suspension, or absence of any Commissioner, the Governor-General may appoint a person to act as a Deputy Commissioner during the illness, suspension, or absence, and the deputy shall whilst so acting have all the powers and perform all the duties of a Commissioner:

Provided that where the Commissioner is required by this Act to be of experience in the law, the deputy shall be of experience in the law.

6.–(1.) The Governor-General shall appoint one of the three Commissioners to be Chief Commissioner, and on the happening of any vacancy in the office of Chief Commissioner the Governor-General shall appoint a person to fill that office.

(2.) In case of the illness, suspension, or absence of the Chief Commissioner, the Governor-General shall appoint one of the other Commissioners to act as Chief Commissioner during the illness, suspension, or absence.

7.–(1.) The Chief Commissioner shall receive a salary of Two thousand five hundred pounds a year, and each of the other Commissioners shall receive a salary of Two thousand pounds a year.

(2.) There shall be paid to each Commissioner, on account of his expenses in travelling to discharge the duties of his office, such sums as are considered reasonable by the Governor-General.

8. Every member of the Commission shall, before proceeding to discharge the duties of his office, take an oath or affirmation of allegiance in the form of the Schedule to the Constitution, and also an oath or affirmation in the form following:—

I, A. B., do swear that I will well and truly serve our Sovereign Lord the King in the office of a member of the Inter-State Commission, and I will do right to all manner of people according to law, without fear or favour, affection, or ill-will: So help me God.

or, I, A. B., do solemnly and sincerely promise and declare that (&c., as above, except the words "So help me God").

9.–(1.) The Governor-General may suspend any Commissioner from office for misbehaviour or incapacity. The Minister shall, within seven days after the suspension, if the Parliament is then sitting, or if the Parliament is not then sitting, within seven days after the next meeting of the Parliament, cause to be laid before both Houses of the Parliament a full statement of the grounds of suspension.

(2.) A Commissioner who has been suspended shall be restored to office unless each House of Parliament within forty days after the statement has been laid before it, and in the same session, passes an address praying for his removal on the grounds of proved misbehaviour or incapacity.

10.–(1.) Subject to the regulations, the Commission may hold sittings in any part of the Commonwealth in such place or places as it may deem most convenient for the transaction of its business or proceedings, and shall keep minutes of its proceedings in the prescribed form.

(2.) The Chief Commissioner shall preside as Chairman at all meetings of the Commission at which he is present, and in his absence the senior Commissioner present shall preside as Chairman.

11.–(1.) For the conduct of business any two Commissioners shall be a quorum, and shall have, subject to the next subsection, all the powers of the Commission.

(2.) At a meeting of the Commission the decision of the majority shall prevail.

(3.) If, at any meeting of the Commission at which only two Commissioners are present, those Commissioners differ in opinion upon any matter, the determination of the matter shall be postponed until all the Commissioners are present.

12. No act or proceeding of the Commission shall be invalidated or prejudiced by reason only of there being, at the time when the act or proceeding was done, taken, or commenced, a vacancy in the office of any one Commissioner.

13. A Commissioner shall not be in the employment of or hold any official relation to any common carrier, or be in any way concerned or interested in the business of a common carrier, or in any way participate or claim to be entitled to participate in any profit, benefit, or emolument arising from any such business.

14. A Commissioner shall not exercise any power by this Act conferred upon him in any matter in which he is directly or indirectly interested.

15. The Commissioners shall devote the whole of their time to the performance of their duties, and no Commissioner shall accept or hold any paid employment outside the duties of his office as a Commissioner, or be a director of a company.

Part III.—Investigations.

16. The Commission shall be charged with the duty of investigating, from time to time, all matters which in the opinion of the Commission ought in the public interest to be investigated affecting—

(*a*) the production of and trade in commodities;

(*b*) the encouragement, improvement, and extension of Australian industries and manufactures;

(*c*) markets outside Australia, and the opening up of external trade generally;

(*d*) the effect and operation of any Tariff Act or other legislation of the Commonwealth in regard to revenue, Australian manufactures, and industry and trade generally;

(*e*) prices of commodities;

(*f*) profits of trade and manufacture;

(*g*) wages and social and industrial conditions;

(*h*) labour, employment, and unemployment;

(*i*) bounties paid by foreign countries to encourage shipping or export trade;

(*j*) population;

(*k*) immigration; and

(*l*) other matters referred to the Commission by either House of the Parliament, by resolution, for investigation.

17.—(1.) The Commission may investigate all matters affecting—

(*a*) the extent of diversions or proposed diversions, or works or proposed works for diversions, from any river and its tributaries, and their effect or probable effect on the navigability of rivers that by themselves or by their connexion with other waters constitute highways for inter-state trade and commerce;

(*b*) the maintenance and the improvement of the navigability of such rivers;

(*c*) the abridgment by the Commonwealth by any law or regulation of trade or commerce of the rights of any State or the residents therein to the reasonable use of the waters of rivers for conservation or irrigation;

(*d*) the violation by any State, or by the people of any State, of the rights of any other State, or the people of any other State, with respect to the waters of rivers.

(2.) In this section "diversions" includes obstructions, impoundings, and appropriations of water that diminish or retard the volume of flow of a river.

Part IV.—Inter-State Traffic.

rates and preferences.

18. All rates fixed or made by any common carrier—

(*a*) for any service rendered in respect of inter-state commerce; or

(*b*) which affect inter-state commerce, shall be reasonable and just, and every such rate which is unreasonable or unjust is hereby prohibited.

RATES ON STATE RAILWAYS.

19.—(1.) It shall not be lawful for any State, or for any State Railway Authority, to give or make upon any railway the property of the State, in respect of inter-state commerce, or so as to affect such commerce, any preference or discrimination which is undue and unreasonable, or unjust to any State.

(2.) In deciding whether a lower charge or difference of treatment constitutes within the meaning of this section a preference or discrimination which is undue or unreasonable, or unjust to any State, the Commission shall have due regard to the financial responsibilities incurred by any State in connexion with the construction and maintenance of its railways.

20. Nothing in this Act shall render unlawful any rate for the carriage of goods upon a railway, the property of a State, if the rate is deemed by the Commission to be necessary for the development of the territory of the State, and if the rate applies equally to goods within the State and to goods passing into the State from other States.

CARRIERS AND STATE AUTHORITIES OTHER THAN STATE RAILWAY AUTHORITIES.

21. No common carrier or State Authority, other than a State Railway Authority, shall, in respect of inter-state commerce, or so as to affect such commerce—

(*a*) make or give any undue or unreasonable preference or advantage to any particular person, State, locality, or description of traffic; or

(*b*) subject any particular person, State, locality or description of traffic to any undue or unreasonable prejudice or disadvantage.

22.—(1.) Whenever it is shown that any common carrier or State Authority, other than a State Railway Authority, in respect of inter-state commerce, or so as to affect such commerce—

(*a*) charges to any person or class of persons, or to the persons in any locality or State, lower rates for the same or similar goods, or for the same or similar services, than the carrier or authority charges to other persons or classes of persons, or to the persons in another locality or State; or

(*b*) makes any difference in treatment in respect of any such persons,

the burden of proving that the lower rate or difference in treatment is not an undue or unreasonable preference or advantage shall lie on the common carrier or authority.

(2.) In deciding whether a lower rate or difference of treatment constitutes an undue preference, the Commission may as far as it thinks reasonable, in addition to any other circumstances affecting the case, take into consideration whether the lower rate or difference of treatment is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant.

PART V.—JUDICIAL POWERS OF THE COMMISSION.

JURISDICTION.

23. The Commission, in the exercise of its powers for the hearing or determination of any complaint, dispute, or question, or for the adjudication of any matter, shall be a court of record.

24. The Commission shall have jurisdiction to hear and determine any complaint, dispute, or question, and to adjudicate upon any matter arising as to—

(*a*) any preference, advantage, prejudice, disadvantage, or discrimination given or made by any State or by any State authority or by any common carrier in contravention of this Act, or of the provisions of the Constitution relating to trade and commerce or any law made thereunder;

(*b*) the justice or reasonableness of any rate in respect of interstate commerce, or affecting such commerce;

(*c*) anything done or omitted to be done by any State or by any State Authority or by any common carrier or by any person in contravention of this Act or of the provisions of the Constitution relating to trade or commerce or any law made thereunder.

25. Any person complaining against any State, State Authority, common carrier, or person of anything done or left undone in contravention of this Act, or of the provisions of the Constitution relating to trade and commerce, or any law made thereunder, may apply to the Commission, and the Commission may hear and determine the matter of the complaint according to equity and good conscience and in such manner as to do justice between the parties, and may for that purpose if it thinks fit direct and prosecute, in such mode and by such persons as it thinks proper, all such inquiries as it deems necessary.

26. Any of the following authorities, that is to say—

(*a*) the Commonwealth;

(*b*) any State, or any State Railway Authority;

(*c*) any borough, municipality, or body politic;

(*d*) any Harbor Board, Marine Board, or other State Authority; or

(*e*) any such association of traders or freighters, or chamber of commerce, manufacturers, or agriculture, as is in the opinion of the Commission a proper body to make the complaint, may make to the Commission any complaint which the Commission has jurisdiction to determine, and may do so without proof that the authority is directly aggrieved by the matter complained of, and any such authority may appear in opposition to any such complaint in any case where the authority, or the persons represented by it, appear to the Commission to be likely to be affected by any determination of the Commission upon the complaint.

27. The Commission may of its own motion summon before it any State authority, common carrier, or person who it has reason to believe has done anything or left anything undone in contravention of this Act, or of the provisions of the Constitution relating to trade and commerce or any law made thereunder, and shall have jurisdiction to hear and determine the matter and may make such orders in

relation thereto as if complaint had been made to it of the contravention.

28. Any complaint, dispute, question, or difference whatever relating to external or inter-state commerce may, upon the application of the parties, and with the consent of the Commission, be referred to the Commission for decision; and the Commission shall thereupon have the same jurisdiction to hear and determine the complaint, dispute, question, or difference, and the decision of the Commission thereon may be carried into effect in the same way, as in other matters in which the Commission has jurisdiction.

RELIEF.

29. The Commission, in any matter in which it has jurisdiction, shall have power to grant and shall grant, either absolutely or on such terms and conditions as may be just, all relief to which any of the parties are entitled in respect of any claim properly brought forward by them in the matter; so that as far as possible all matters in controversy between the parties regarding the matter of complaint, or arising out of or connected with it, may be completely and finally determined, and all multiplicity of proceedings concerning any of such matters may be avoided.

30.—(1.) Where the Commission has jurisdiction to hear and determine any matter, it may, in addition to or in substitution for any other relief, award to any complaining party who is aggrieved such damages as it finds him to have sustained:

Provided that damages shall not be awarded unless complaint has been made to the Commission within one year from the discovery by the party aggrieved of the matter complained of.

(2.) The Commission may ascertain the amount of the damages either by trial before itself, or by directing an inquiry to be taken before one or more of the Commissioners or before some officer of the Commission.

31. If it appears to the Commission, on the hearing of any complaint, that anything has been done or left undone by any party in contravention of this Act or of the provisions of the Constitution relating to trade and commerce, or any law made thereunder, the Commission may order that the party be restrained by injunction or other proper process mandatory or otherwise from further continuing the contravention.

32. If it appears to the Commission, on the hearing of any complaint, that anything done or left undone in contravention of this Act, or of the provisions of the Constitution relating to trade and commerce, or any law made thereunder, has been so done or left undone in pursuance of any regulation made by any State or by any State Authority, the Commission may declare the regulation, or any part thereof, to be void, and thereupon the same shall cease to have any effect.

33.—(1.) If it appears to the Commission, on the hearing of any complaint, that anything has been done or left undone by any party in contravention of this Act, or of the provisions of the Constitution relating to trade and commerce, or any law made thereunder, it may, by the order made on the hearing or by any subsequent order, declare the thing which the party is required to do or not to do for the future to bring himself into conformity with this Act or with the

Constitution or with any such law and for that purpose it shall have power—

(*a*) to name a maximum rate for any service;

(*b*) to name both a maximum and a minimum rate, when that is necessary to prevent an unlawful preference or discrimination;

(*c*) to name a maximum or minimum of difference between two rates, when that is necessary to prevent an unlawful preference or discrimination;

(*d*) to determine the apportionment between carriers of a joint rate and the terms and conditions under which business shall be interchanged when that is necessary to the execution of the provisions of this Act or of the Constitution or of any such law; and

(*e*) to require any such amendment in the rules and regulations for the movement of traffic as is required to bring them into conformity with the provisions of this Act or of the Constitution or of any such law.

(2.) The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of any order under the provisions of this Act.

34.—(1.) When the Commission makes an order in pursuance of the powers conferred by this Part, it may by the same or a subsequent order fix pecuniary penalties, or maximum pecuniary penalties, or maximum and minimum pecuniary penalties, for disobedience of the order or any part thereof.

(2.) A penalty so fixed shall not exceed Two hundred pounds; or, in the case of a continuing disobedience, Two hundred pounds for each day during which the disobedience continues.

(3.) Any party or person who disobeys any order of the Commission shall be guilty of an offence, and shall be liable on summary conviction to the penalty so fixed, or to a penalty within the limits so fixed, as the case may be; and where no penalty has been so fixed, shall be liable to a penalty not exceeding One hundred pounds; or, in the case of a continuing disobedience, One hundred pounds for each day during which the disobedience continues.

(4) For the purposes of this section, an act, omission, or failure of an officer, servant, agent, or other person acting for or employed by a party, within the scope of his employment, shall be deemed to be the act, omission, or failure of the party as well as of the person.

35.—(1.) Any order made by the Commission for the purpose of carrying into effect any provision of this Act or of the Constitution or of any law may be made a rule or order of the High Court, and shall be enforced in like manner as any rule or order of the High Court.

(2.) For the purpose of carrying this section into effect, the Justices of the High Court, or such of them as may make Rules of Court in other cases, may make general rules and orders in the same manner as they may make general rules and orders with respect to any other proceedings in the High Court.

POWERS AND PROCEEDINGS.

36. For the purposes of this Part of this Act, the Commission shall have full jurisdiction to hear and determine all matters, whether of law or of fact, and shall, as respects the attendance and examination

of witnesses, the production and inspection of documents, the entry on and inspection of property, and all other matters whatsoever necessary or proper for the due exercise of its jurisdiction under this Part or otherwise for carrying this Part into effect, have all such powers rights and privileges as are vested in the High Court.

37.—(1.) The Commission may, in the exercise of any jurisdiction conferred on it by this Part, call in the aid of one or more assessors, who shall be persons of engineering commercial or other technical knowledge.

(2.) There shall be paid to the assessors such remuneration as the Minister upon the recommendation of the Commission directs.

38. In any proceedings under this Act any party may appear before the Commission either in person or by barrister or solicitor.

39. Every finding of fact made by the Commission in respect of any complaint shall, in any other complaint before the Commission, be evidence of each and every fact found.

40. The costs of and incidental to any proceedings before the Commission shall be in the discretion of the Commission, which may order by whom and to whom they are to be paid and by whom they are to be taxed.

41. The Commission may review and rescind or vary any order made by it, but save as is by this Act provided every order of the Commission shall be final.

APPEALS.

42.—(1.) No appeal shall lie from the Commission except an appeal to the High Court on questions of law only.

(2.) An appeal shall not be brought except in conformity with such rules of court as may be made in relation to such appeals by the Justices of the High Court, or such of them as have power to make rules of court in other cases.

(3.) On the hearing of an appeal the High Court may draw all such inferences as are not inconsistent with the facts expressly found and are necessary for determining the question of law, and shall have all such powers for that purpose as if the appeal were an appeal from a judgment of a Justice exercising the original jurisdiction of the High Court, and may make any order which the Commission could have made and also such further or other order as may be just.

(4) The costs of and incidental to an appeal shall be in the discretion of the High Court, but no Commissioner shall be liable to costs by reason or in respect of any appeal.

(5) The operation of any order of the Commission shall not be stayed pending the decision of an appeal unless the Commission or the High Court otherwise orders.

43.—(1.) The Commission may, if it thinks fit, in any proceeding before it under this Act, at the instance of any party to the proceeding, and upon such security being given by the appellant as the Commission may direct, state a case in writing for the opinion of the High Court upon any question which in the opinion of the Commission is a question of law.

(2) The High Court shall hear and determine the questions of law arising thereon, and shall thereupon affirm, reverse, or amend the order in respect of which the case has been stated, or remit the

matter to the Commission with the opinion of the High Court thereon, or may make such other order in relation to the matter, and such order as to costs, as it thinks fit.

44. Save as provided by this Act, an order or proceeding of the Commission shall not be questioned or reviewed, and shall not be restrained or removed by prohibition, injunction, certiorari, or otherwise either at the instance of the Crown or otherwise.

PART VI.—MISCELLANEOUS.

45. The Commission shall once in every year make a report to the Minister containing a summary of the work done and investigations made and proceedings taken by the Commission during the preceding year, and such information and data collected by the Commission as it may deem of value for the determination of questions connected with any matter dealt with by the Commission under this Act, together with such recommendations as to further legislation as the Commission thinks expedient.

46. The Commission shall from time to time forward to the Minister reports concerning investigations and proceedings made or taken by the Commission.

47. The Minister shall cause the yearly report and all reports concerning investigations and proceedings received by him from the Commission to be laid before both Houses of the Parliament within thirty days after the receipt thereof if the Parliament is then sitting, and if not within thirty days after the next meeting of the Parliament.

48. The Commission may publish such information relating to any matter investigated by it as it thinks fit.

49. The Commission may, in connection with any investigation or proceeding, take evidence in public or in private, but it shall only take evidence in private where it considers that it is desirable in the public interest that the evidence should be taken in private.

50. The Chief Commissioner may by writing under his hand summon any person to attend the Commission at a time and place named in the summons, and then and there to give evidence and to produce any books documents or writings in his custody or control which he is required by the summons to produce.

51. Every witness who has been summoned to attend the Commission shall appear and report himself from day to day unless excused by the Chief Commissioner or Chairman or until he is released from further attendance by the Chief Commissioner or Chairman.

52. Any of the Commissioners may administer an oath to any person appearing as a witness before the Commission, whether the witness has been summoned or appears without being summoned, and may examine the witness upon oath.

53.–(1.) Where any witness to be examined before the Commission conscientiously objects to take an oath, he may make an affirmation that he conscientiously objects to take an oath, and that he will state the truth, the whole truth, and nothing but the truth, to all questions that may be asked him.

(2.) An affirmation so made shall be of the same force and effect, and shall entail the same liabilities, as an oath.

54.–(1.) If any person served with a summons to attend the Commission as a witness fails to attend the Commission in answer to the summons, the Chief Commissioner or Chairman may, on proof by statutory declaration of the service of the summons, issue a warrant for his apprehension.

(2.) The warrant shall authorize the apprehension of the witness and his being brought before the Commission, and his detention in custody for that purpose until he is released by order of the Chief Commissioner or Chairman.

(3.) The warrant may be executed by any member of the police force of the Commonwealth or of a State or Territory, or by any person to whom it is addressed, and the person executing it shall have the power to break and enter any place building or vessel for the purpose of executing it.

(4.) The apprehension of any witness under this section shall not relieve him from any liability incurred by him by reason of his non-compliance with the summons.

55.–(1.) If any person served with a summons to attend the Commission, when the summons is served personally, fails without reasonable excuse to attend the Commission, or to produce any documents, books, or writings in his custody or control which he was required by the summons to produce, he shall be guilty of an offence.

Penalty: Five hundred pounds.

(2.) It shall be a defence to a prosecution under this section for failing without reasonable excuse to produce any documents, books, or writings, if the defendant proves that the documents, books, or writings were not relevant to the investigation or proceeding.

56. If any person appearing as a witness before the Commission refuses to be sworn or to make an affirmation or to answer any question relevant to the investigation or proceeding put to him by any of the Commissioners he shall be guilty of an offence.

Penalty: Five hundred pounds.

57.–(1.) Where any person has on any day done or omitted to do something, and his act or omission amounts to an offence against either of the last two preceding sections, and does or omits to do the same thing at any meeting of the Commission held on some other day, each such act or omission shall be a separate offence.

(2.) Where any person, who has been convicted of any offence against either of the last two preceding sections, is subsequently convicted on information by the Attorney-General of any offence against either of those sections, committed by him after the first mentioned conviction and in relation to the same investigation or proceeding, he shall be liable to a penalty of not less than Five hundred pounds and not more than One thousand pounds, and to imprisonment for such period not exceeding three months as the Court thinks fit to order.

58. Nothing in this Act shall make it compulsory for any witness before the Commission to disclose to the Commission any secret process of manufacture.

59. A statement or disclosure made by any witness in answer to any question put to him by the Commission or any of the Commissioners shall not (except in proceedings for an offence against this Act) be admissible in evidence against him in any civil or criminal

proceedings in any Commonwealth or State Court or any Court of any Territory of the Commonwealth.

60. The Commission may inspect any documents, books, or writings produced before it, and may retain them for such reasonable period as it thinks fit, and may make copies of such matter as is relevant to the inquiry or take extracts from them.

61. Any witness before the Commission who knowingly gives false testimony touching any matter, material to any investigation or proceeding before the Commission, shall be guilty of an indictable offence.

Penalty: Imprisonment for five years.

62. Any person who—

(*a*) gives, confers, or procures, or promises or offers to give or confer, or to procure or attempt to procure, any property or benefit of any kind to, upon, or for, any person, upon any agreement or understanding that any person called or to be called as a witness before the Commission shall give false testimony or withhold true testimony, or

(*b*) attempts by any means to induce a person called or to be called as a witness before the Commission to give false testimony, or to withhold true testimony, or

(*c*) asks, receives or obtains, or agrees or attempts to receive or obtain any property or benefit of any kind for himself, or any other person, upon any agreement or understanding that any person shall as a witness before the Commission give false testimony or withhold true testimony.

shall be guilty of an indictable offence.

Penalty: Imprisonment for five years.

63. Any person who practises any fraud or deceit, or knowingly makes or exhibits any false statement, representation, token, or writing, to any person called or to be called as a witness before the Commission, with intent to affect the testimony of that person as a witness, shall be guilty of an indictable offence.

Penalty: Imprisonment for two years.

64. Any person who, knowing that any book, document, or writing is or may be required in evidence before the Commission, wilfully destroys it or renders it illegible or undecipherable or incapable of identification, with intent thereby to prevent it from being used in evidence, shall be guilty of an indictable offence.

Penalty: Imprisonment for two years.

65. Any person who wilfully prevents or wilfully endeavors to prevent any person who has been summoned to attend as a witness before the Commission from attending as a witness or from producing anything in evidence pursuant to the summons to attend shall be guilty of an indictable offence.

Penalty: Imprisonment for one year.

66. Any person who uses, causes, inflicts, or procures, any violence, punishment, damage, loss, or disadvantage to any person for or on account of his having appeared as a witness before the Commission, or for or on account of any evidence given by him before the Commission, shall be guilty of an indictable offence.

Penalty: Five hundred pounds, or imprisonment for one year.

67.—(1.) Any employer who dismisses any employee from his employment, or prejudices any employee in his employment, for or on

account of the employee having appeared as a witness before the Commission, or for or on account of the employee having given evidence before the Commission, shall be guilty of an indictable offence.

Penalty: Five hundred pounds, or imprisonment for one year.

(2) In any proceeding for any offence against this section it shall lie upon the employer to prove that any employee shown to have been dismissed or prejudiced in his employment was so dismissed or prejudiced for some reason other than the reasons mentioned in sub-section (1.) of this section.

68.—(1.) Any person who wilfully insults or disturbs the Commission, or interrupts the proceedings of the Commission, or uses any insulting language towards the Commission, or by writing or speech uses words false and defamatory of the Commission, or is in any manner guilty of any wilful contempt of the Commission, shall be guilty of an offence.

Penalty: One hundred pounds, or imprisonment for three months.

(2.) When the Commission is sitting in the exercise of its powers under Part V. of this Act, the Chief Commissioner or Chairman shall, in relation to any offence against sub-section (1.) of this section committed in the face of the Commission, have all the powers of a Justice of the High Court sitting in open Court in relation to a contempt committed in face of the Court, except that any punishment inflicted shall not exceed the punishment provided by sub-section (1.) of this section.

69.—(1.) Each Commissioner shall in the exercise of his duty as Commissioner have the same protection and immunity as a Justice of the High Court.

(2.) Every witness summoned to attend or appearing before the Commission shall have the same protection, and shall in addition to the penalties provided by this Act be subject to the same liabilities in any civil or criminal proceeding, as a witness in any case tried in the High Court.

(3.) Where the expenses allowable to a witness summoned under this Act, for travelling from the place where the summons is served to the place at which he is summoned to attend, exceed five shillings, the amount of such expenses shall be tendered to him before the journey.

70.—(1.) The Governor-General may make regulations prescribing a scale of allowances to be paid to any witness summoned under this Act for his travelling and other expenses.

(2.) The claim to allowance of any such witness, certified by the Chief Commissioner or Chairman, shall be paid by the Treasurer out of moneys to be provided by the Parliament for the purposes of the Commission.

71. Proceedings for the commitment for trial of any person charged with an indictable offence against this Act may be instituted by any person.

72.—(1.) Proceedings in respect of any offence against this Act (other than an indictable offence) may be instituted by action, information, or other appropriate proceeding, in the High Court by the Attorney-General in the name of the King, or by information or other appropriate proceeding by any person in any court of summary jurisdiction.

(2.) Any proceedings in the High Court under this section may be heard and determined by a single Justice of the High Court sitting without a jury.

73. Proceedings in the High Court under the last preceding section may be commenced, prosecuted, and proceeded with in accordance with the practice and procedure of the Court applicable to Crown suits for the recovery of penalties, or in accordance with the directions of the Court or a Justice.

74. Where any pecuniary penalty is adjudged to be paid by any person convicted of an offence against this Act the Court may—

(*a*) commit the offender to gaol until the penalty is paid; or

(*b*) release the offender upon his giving security for the payment of the penalty; or

(*c*) exercise for the enforcement and recovery of the penalty any power of distress or execution possessed by the Court for the enforcement and recovery of penalties in any other case.

75. The powers of distress and execution for the enforcement and recovery of penalties may be exercised in the case of any pecuniary penalty adjudged to be paid by any offender, notwithstanding that he has been committed to gaol until the penalty is paid.

76. The gaoler of any gaol to which any offender has been committed for non-payment of any penalty shall discharge him—

(*a*) on payment, by the offender to him, of the penalty adjudged; or

(*b*) on a certificate from the proper officer of the Court that the penalty has been paid or realized; or

(*c*) if the penalty adjudged to be paid is not paid or realized according to the following table:—

Amount of Penalty.	Period after commencement of Imprisonment at the expiration of which Defendant is to be discharged.
£2 or under	Seven days.
Over £2 and not more than £5	Fourteen days.
Over £5 and not more than £20	One month.
Over £20 and not more than £50	Two months.
Over £50 and not more than £100	Three months.
Over £100 and not more than £200	Six months.
Over £200	One year.

77. In any proceedings for an offence against this Act (other than proceedings for the commitment for trial of a person charged with an indictable offence) the Court may award costs against any party, and all provisions of this Act relating to the recovery of penalties, except as to commitment to gaol, shall extend to the recovery of any costs adjudged to be paid.

78. All fees, fines, and penalties paid or recovered under this Act shall be paid to the Consolidated Revenue Fund.

79. The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed, or are necessary or convenient to be

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prescribed, for giving effect to this Act, and in particular for any of the following purposes:—

(*a*) for prescribing the procedure and practice of the Commission under this Act;

(*b*) for enabling the Commission in cases to be specified in such regulations to exercise its jurisdiction by any one Commissioner;

Provided that any person aggrieved by any order or decision made in any such case may require a rehearing by all the Commissioners;

(*c*) For prescribing the fees to be taken and scales of costs to be allowed in relation to any proceedings before the Commission;

(*d*) for imposing penalties (not exceeding in the case of a pecuniary penalty One hundred pounds and in the case of imprisonment a period of three months) for any breach of the regulations.

EXHIBIT D.—GERMAN LAW CONCERNING THE SALE OF POTASH SALTS OF MAY 25, 1910.[1]

We, William, by God's grace German Emperor, King of Prussia, etc., decree in the name of the Empire, with the consent of the Federal Council and the Imperial Diet, as follows:

For the period up to December 31, 1925, the following regulations are in force relative to the sale of potash salts:

PART I.—GENERAL REGULATIONS.

SECTION 1.

Potash salts may be sold by the possessors of potash works only in accordance with the provisions of this law.

SECTION 2.—*Definition of potash salts.*

Potash salts in the meaning of this law are:

(*a*) Potassic minerals obtained from potash salt mines—crude potash salts—in solid or dissolved form.

(*b*) Chloride of potassium, sulphate of potash, sulphate of potash-magnesia, the so-called potash manure salts, as also all other manufactures containing potassium, which are generally produced directly from the crude potash salts; furthermore, all residues of these products containing potassium.

(*c*) The mixtures of crude salts (*a*) and manufactured products (*b*)—mixed salts.

In doubtful cases as to whether a product of the potash industry belongs to the potash salts cited under *a* to *c*, the Federal Council decides.

SECTION 3.—*Definition of a sale.*

A sale within the meaning of this law is any transfer of possession of potash salts to another.

The delivery of potash salts to a factory or department of a factory belonging to the possessor of a potash works for the purpose of

[1] Gesetz über den Absatz von Kalisalzen vom 25 Mai 1910; Reichsgesetzblatt 1910, S. 775.

being further worked into products not mentioned under section 2, paragraphs 1 (*b*) and (*c*), constitutes a sale.

Thirdly, every shipment of potash salts to a foreign country constitutes a sale.

The delivery of crude salts to be further worked into the products designated under section 2, paragraphs 1 (*b*) and (*c*), to a factory, the possessor of which is absolutely held to comply with the provisions relative to selling, by the possessor of the potash works making the delivery, does not, however, constitute a sale. The materials produced in such factories are considered as the products of the potash works supplying the crude salts. The apportioning office decides whether the factory comes under the provisions of this paragraph.

SECTION 4.—*Sales abroad.*

The sale of potash salts into a foreign country may be effected only by the possessors of potash works.

SECTION 5.

The products designated in section 2, paragraph 1, under (*b*) and (*c*), may be produced only by possessors of potash works and the possessors of separate factories (sec. 49) existing at the time this law goes into effect. Possessors of separate factories have this right only so long as they do not make these products on a larger scale than heretofore.

SECTION 6.—*Definition of possessor of potash works.*

Anyone operating for his own account a potash mine (potash works) is the possessor of a potash works within the meaning of this law. Provisions made for the possessor of a potash works are also valid for unions of the same.

PART II.—DETERMINATION OF THE TOTAL QUANTITY OF THE SALES AND OF THE SHARE IN THE SALE OF THE SEPARATE POTASH WORKS.

SECTION 7.—*Total quantity of the sale.*

The total quantity of the sale to be allotted for the calendar year to the possessors of potash works is determined yearly by the apportioning office. It is to be determined in metric hundredweights [100 kg.] of pure potash (K_2O) and is to be at least as much as the total sale determined for the previous year plus 5 per cent. At the same time the apportioning office has to decide what part of the total sales quantity is for the domestic market and for export and what quantities of the different sorts are to be supplied.

The apportioning office may subsequently increase the quantities determined on.

For the period from May 1, 1910 to December 31, 1910, a proportionate quantity is to be determined on by the Federal Council.

SECTION 8.—*Quotas.*

The determination of the relative shares of the separate possessors of potash works in the sale of potash salts (quotas) is made by the apportioning office.

The possessors of potash works participate in the domestic sale and in the export sale, as also in the sale of the different sorts of potash salts, in accordance with their quotas.

The possessor of a potash works may exceed the sales quantity allotted to him by at most 10 per cent, if he renounces the assignment of a corresponding sales quantity for the following calendar year.

If he remains below the sales quantity allotted to him by at most 10 per cent he may deliver a corresponding quantity within the next calendar year.

Possessors of potash works who in consequence of the nature of their deposits can not supply some of the kinds of potash salts mentioned in section 20, paragraph 1, are to be given a proportionate participation in other kinds of potash salts by the apportioning office for the purpose of equalization.

The participation of a possessor of a potash works in the export sale decreases in the same proportion in which the possessor of a potash works falls behind the participation in the domestic sale during the calendar year.

SECTION 9.—*Principles for the determination of quotas.*

The quotas are expressed in thousandths of the total sale. A division of the thousandths may be expressed only according to the decimal system.

The size of the quotas is to be determined by the extent and nature of the potash-salt deposits opened up by workings and borings, as also by the capacity of the operating equipment.

Only one quota is determined for each potash works.

SECTION 10.

If from one potash works several are formed, they count only then as independent works, to be given separate quotas, even when they have been extended by the purchase of parts of outside areas; if—

(1) According to the character of the geological conditions and according to the information gained by workings and borings at least 50,000 metric hundredweights of pure potash (K_2O) can be supplied annually for 50 years.

(2) They are so equipped with technical devices that they can mine and ship a quantity of crude salt corresponding to their quotas.

SECTION 11.

For a second operating shaft opened in the same works and connected with the main shaft an addition to the quota will be granted from January 1, 1912, which amounts to 10 per cent of the average quota of all works. For second shafts which become operative after the 1st of January, 1912, the addition enters into force with the day on which the opening with the main shaft is effected.

SECTION 12.—*Provisional quotas.*

To possessors of such potash works which become capable of delivery after promulgation of the law there will be assigned a provisional quota for the first two years after the potash-salt deposit has

been reached by workings, and if a sufficient determination of the nature of the deposit and operating conditions has not been arrived at, then until such determination is obtained, the same is to be made high enough to allow of a regular opening and preparation of the deposit. The provisional quota must not exceed 50 per cent of the average quota of all the works.

After determining the nature of the deposit and the operating conditions, but at the earliest not until the expiration of two years after the potash-salt deposit has been reached by workings, a final quota is established for such works. For the third year after the potash deposit has been reached the quota is 30 per cent less than this final quota, for the fourth year 20 per cent less, and for the fifth year 10 per cent less.

Potash works which are in possession of and in operation by the Empire or one of the federated States, or in which the Empire or a federated State is interested to the extent of at least one-third, are given, until the nature of the deposit and operating conditions are determined, a temporary quota according to paragraph 1, and as soon as the determination is effected a final quota; the limitations of paragraph 2 are not applicable to these works. The same applies to other works which before December 17, 1909, have begun the sinking of shafts or have evidently made serious preliminary efforts therefor; that is, if they have continued the sinking of shafts or the preliminary work without culpable delay.

SECTION 13.—*Reduction of the quotas.*

If in a potash works the wages paid to a class of workmen decrease in the yearly average for a regular shift below the wage paid to this class on the average for the calendar years 1907 to 1909, then the quota of the works is reduced for the following year in the same proportion in which the wage has decreased for the labor class which has suffered the greatest wage reduction.

The quota is furthermore reduced if in a labor class the regular time of work is extended beyond the time limit prevailing in the year 1909, and that reduction is in proportion to the increase to the labor class most affected.

The decrease in the quota is at least 10 per cent.

If potash works were not yet in operation in the year 1909, or if particular kinds of labor in the works were started only after the beginning of the year 1909, or if the operating conditions in the works have changed materially as compared with those of the year 1909, a reduction is made if the wage conditions or the length of shifts in the yearly average after the beginning of production were more unfavorable than they were in the yearly average during the years 1907 to 1909 in other potash works with similar conditions.

SECTION 14.

A reduction of the quota is not made if the possessor of a potash works proves that the average wage scale was not reduced for work done on the shift basis or by contract as compared with the wage scale paid for similar work done in the years 1907 to 1909.

SECTION 15.

The increase in the quota which occurs in consequence of the deductions[1] is not participated in by the possessor of a potash works whose quota is decreased by the provision of section 13.

SECTION 16.

The provisions of sections 13 and 14 are not applicable to potash works in which the wage and labor conditions are regulated by special contracts made between the possessors of potash works and a majority, as established by secret vote, of the workmen interested; the contracts must not contain any provisions which would hinder or forbid the right of the laborers to unite.

SECTION 17.—*Validity of the quotas.*

For the possessors of potash works the quotas cited in the attached tables are in force until new ones are determined upon. A new determination of the quotas of all potash works on the basis of the provisions of this section is made with the effect that the new quotas to be determined upon enter into force on January 1, 1912. From then on there will be a new determination of the quotas every five years for all the potash works.

If a potash works becomes permanently incapable of delivering, its quota is canceled; decision relative hereto lies with the apportioning office.

If a part of the mining area is separated from a potash works, for which a quota has been given, the quota is determined anew.

SECTION 18.—*Change of quotas.*

A change of the quotas in force by recalculation takes place:

(*a*) In the case of the determination of a preliminary or final quota for a new works (secs. 8 to 12).

(*b*) In the case of section 11.

(*c*) In the case of sections 13 and 14.

(*d*) In the case of the permanent incapacity of a works to deliver.

(*e*) In the case of section 17, part 3.

(*f*) In the case of sections 47 and 48.

The recalculation is to be made by the apportioning office.

PART III.—TRANSFER OF QUOTAS AND EXCHANGE.

SECTION 19.

Possessors of potash works may transfer their share in the sale wholly or partially to other potash works and exchange their right of sale of separate kinds among one another.

If on account of the transference of quotas, workmen or officials are out of employment without being able to find another opportunity to work corresponding to their capabilities, or if they suffer a decrease in their earnings, then the transferring potash works possessor

[1] Diminishing reductions from the final quota (see sec. 12).

must make good the resulting loss in earnings up to the period of 26 weeks. In disputes on this question between potash works possessors and workmen, the industrial court or miners court, where such exist, have jurisdiction.

If the transfer exceeds one-half of the total allotment of the transferring potash works possessor in pure potash, it requires the consent of the proper central authorities of the Province or State. The consent is to be made dependent on the guaranty of damage claims cited in paragraph 2. Prior to granting the consent the interested communities must be heard.

PART IV.—SALES PRICES.

SECTION 20.—*Domestic prices.*

The sales prices of the possessors of potash works for the supply of potash salts to the domestic market must not exceed the following prices at the works (for 1 per cent of potash (K_2O) in a metric hundredweight):

	Pf.
I. Carnalite with at least 9 per cent and less than 12 per cent of K_2O [1]	8.5
II. Crude salts with 12 to 15 per cent K_2O [1]	10.0
III. Manure salts with—	
20 to 22 per cent of K_2O	14.0
30 to 32 per cent of K_2O	14.5
40 to 42 per cent of K_2O	15.5
The calculation of the prices is on whole per cents. Fractions of a per cent are not taken into consideration.	
IV. Chloride of potassium with—	
50 to 60 per cent of K_2O	27.0
More than 60 per cent of K_2O	29.0
V. Sulphate of potash with over 42 per cent of K_2O	35.0
Sulphate of potash-magnesia	31.0

For potash salts, which are not indicated in paragraph 1, the Federal Council determines the maximum price in accordance with the above determinations of prices.

The above maximum prices remain in force until December 31, 1913. For the following period the maximum prices are determined every five years by the Federal Council after hearing the representatives of the possessors of potash works and of the consumers. An increase requires the consent of the Imperial Diet. Until new prices are determined upon, the ones in force remain in force.

SECTION 21.—*Discounts.*

The Federal Council may determine that a corresponding discount be granted to buyers of larger quantities of potash salts; further, that a discount be granted to purchasers for cash payments, for testing whether goods are up to sample and for cooperation in furthering the sales of potash. All purchasers may unite in order to obtain the above discounts. Under like conditions purchasers must not be differently treated in respect to the discounts.

[1] In a ground condition.

SECTION 22.—*Freight equalization.*

In the calculation of the freight to be charged domestic consignees an equalization of the freight is made by taking as a basis at least three initial stations, and for destinations which are more than 500 kilometers distant from the initial station forming the basis of the freight calculation, a freight rebate is granted according to more definite provisions by the Federal Council.

The freight equalization and the equalization of the freight rebates is effected by the apportioning office for account of all the potash works in accordance with their domestic sales.

SECTION 23.—*Guaranty against deficient content.*

The possessors of potash works are required to indicate the content in pure potash when making deliveries. The permissible deviations from the indicated content, the manner of determining the deficiency, and the compensation to be granted purchasers for the deficiency are determined by the Federal Council. The analysis of the sample drawn at the works is not absolutely conclusive.

SECTION 24.

The prices for sales and deliveries of potash salts to foreign countries must not be lower than the domestic prices indicated in sections 20 and 21 for the domestic market.

Exceptions are permissible by consent of the Federal Council.

SECTION 25.

The Federal Council determines under what conditions the regulations in force for the domestic prices are applicable to deliveries into German protectorates.

PART V.—TAXES.

SECTION 26.

In so far as the possessor of a potash works exceeds the sales quantity of potash salts allotted to him, he must pay a tax into the imperial treasury for the excess quantities.

The tax is, per metric hundredweight of pure potash (K_2O)—

	Marks.
In Group I and II (sec. 20)	10
In Group II:	
Manure salts, with 20 to 22 per cent of K_2O	12
Manure salts, with 30 to 32 per cent of K_2O	14
Manure salts, with 40 to 42 per cent of K_2O	16
In Group IV and V	18

For potash salts which are not indicated in paragraph 2, the Federal Council determines the tax in accordance with the above-stated taxes.

SECTION 27.

Every possessor of a potash works must pay into the imperial treasury a tax of 0.60 mark for every metric hundredweight of pure potash of his entire sale.

The receipts from this tax are to cover the expenses incurred by the Empire from the enforcement of this law and to increase the sale of potash. The receipts and expenditures are to be incorporated in the budget of the Empire.

SECTION 28.

The taxes (secs. 26 and 27) become due on the day of the sale.

The collection of the taxes is carried out by the Provincial or State authorities in accordance with the provisions in force for the collection of public taxes. The Empire will compensate the federated States for the costs incurred in the enforcement of this law or for any further cooperation.

SECTION 29.—*Prescription.*

Claims for the payment or return of taxes become outlawed in one year from the day when the tax becomes due. Claim to subsequent payment of a withheld tax becomes outlawed in three years.

The prescription is interrupted by any action brought against the tax delinquent by the proper authorities for the purpose of enforcing the claim.

PART VI.—APPORTIONING OFFICE, APPEAL COMMISSION.

SECTION 30.—*Apportioning office.*

The apportioning office consists of a presiding officer and six members. The presiding officer and two members, as also their substitutes, are appointed by the Imperial Chancellor with the consent of the Federal Council. They must neither possess a share in private potash works, nor be interested in their proceeds. Remaining members of the apportioning office and their substitutes are elected by the possessors of potash works.

In the decision of the apportioning office on the reductions (sec. 13) of the quota there participate in place of two of the four members selected by the potash works possessors, two members who are elected by the labor representatives of the miners' labor associations (secs. 113, 144 of the law on labor accident insurance) from among the workmen engaged in potash mining and in accordance with the more definite directions of the Federal Council.

SECTION 31.—*Appeal commission.*

The appeal commission consists of five members, who are appointed by the Imperial Chancellor with the consent of the Federal Council. A substitute is appointed for every member. The members must neither possess a potash works nor shares in private potash works or be interested in their proceeds, nor belong to the management or the board of directors of a potash works.

SECTION 32.—*Contested determinations.*

The presiding member may file complaint with the Federal Council against the determination of the apportioning office in accordance with section 7, within the time limit of one week after the date of the determination.

Appeal to the appeal commission (sec. 31) from the determinations and decisions of the apportioning office on the basis of sections 3, 8 to 18, and 22 is permissible.

Appeal must be filed with the appeal commission within a time limit of one month after the issuance of the decision of the apportioning office.

SECTION 33.

Regular legal proceedings are not permissible in so far as by this law complaint against the decisions and determinations of the apportioning office is had to the Federal Council, or to the appeal commission.

SECTION 34.—*Information.*

The possessors of potash works are required to give information to the apportioning office and the appeal commission or their representatives concerning the quantities of potash salts sold and the prices and the delivery conditions agreed upon, concerning other business measures, as also concerning the wage conditions and the duration of the work, and to permit the inspection of the installations and the traversing of the mines. They are further required to show the books and documents of the potash works for the purpose of proving the statements made.

The apportioning office, the appeal commission and their representatives are under obligation to keep secret the business measures of the possessors of potash works which come to their knowledge.

PART VII.—PENAL PROVISIONS.

SECTION 35.

Whoever attempts to defraud the Government of the taxes mentioned in sections 26 and 27 is guilty of defraudation.

Whoever commits defraudation is punishable by a money fine to the fourfold amount of the tax. The tax must, furthermore, be paid. If the amount of the tax can not be determined, a money fine up to 500,000 marks may be imposed.

In case of a repetition of the defraudation subsequent to a prior punishment, a prison term may be imposed up to six months.

SECTION 36.

Violations of the provisions of sections 4, 5, 20, and 24 of this law are punishable by a money fine up to 100,000 marks.

In case of repetition after previous punishment, a prison term up to six months may also be imposed.

SECTION 37.

Violations of the provisions of this law and the administrative regulations promulgated therewith and made known publicly or specially to the interested parties, in so far as they are not liable to a special punishment as per sections 35 and 36, are punished by a disciplinary fine up to 10,000 marks.

SECTION 38.

The proprietors of the works are liable for the fines and the costs of the proceedings incurred by their directors, business managers, assistants, and other persons in their service or pay, as per sections 35 to 37, in case of the inability of the actually guilty party to pay, if it can be proven (1) that the violation has been perpetrated with their knowledge or (2) that they have not proceeded in the choice and engagement of the directors, business managers, and other persons in their service or pay or in their supervision with the care of an orderly business man.

SECTION 39.

In case of section 35 and, in so far as the violated provisions relate to the payment of taxes, also in the case of section 37, there are applicable relative to the administrative criminal proceedings the decrease in punishment and the remission of the fine by pardon as also relative to the infliction of the punishment, the provisions which prevail in proceedings in violation of the customs law.

SECTION 40.

The fines prescribed on the basis of sections 35 to 37 are payable to the State treasury of the federated State the authorities of which have imposed the punishment.

In the case of section 35, paragraph 2, sentence 3, the fifth part of the fine, taking the place of a nondeterminable tax, must be paid into the imperial treasury.

SECTION 41.

For the fulfillment of the obligations established in sections 23 and 24, the possessors of potash works, apart from the determination of the disciplinary penalties may be held by the designated State or Provincial authorities through threat and exaction of a fine up to 10,000 marks. For the proceedings the controlling provisions for the authorities concerning the administrative coercive measures are applicable.

SECTION 42.

A fine which can not be collected is to be converted into imprisonment.

SECTION 43.

The prosecution for tax frauds and violations of section 36 become outlawed in three years, violations punishable by disciplinary penalties become outlawed in one year.

PART VIII.—COSTS.

SECTION 44.

The costs of the apportioning office and of the appeal commission are borne by the Empire. Relative to the costs of proceedings the appropriate provisions of sections 91, 92 of the Code of Civil Procedure are applicable.

PART IX.—TRANSITION PROVISIONS.

SECTION 45.

The provisions of sections 20 to 25 are not applicable to contracts made prior to April 17, 1910.

SECTION 46.

The Federal Council has authority to so far modify the taxes of section 26 on deliveries as per contracts concluded before December 17, 1909, that the prices for the quantities supplied after May 1, 1910, inclusive of the taxes do not become higher than those prevailing up to June 30, 1909.

SECTION 47.

The quota of the works cited in the participation table under numbers 57 and 59 to 68 is to be increased, upon request of the works, prior to January 1, 1913, if the nature of its deposits and operating conditions justify the increase in accordance with Part II.

SECTION 48.

If, before January 1, 1912, an independent potash works, to be given a separate quota, is detached from a potash works, for which a quota has been determined, then the quota of such works is to be deducted from the quota of the potash works from which it was detached.

SECTION 49.

Possessors of potash works may supply crude salts beyond their quota to separate factories existing at the time this law becomes effective, under the conditions to be determined by the Federal Council; the Federal Council may in such case reduce the tax prescribed in section 26. These deliveries must not in the aggregate exceed the quantity of pure potash obtained by the separate factories in the period from May 1, 1909, to the same date of 1910.

PART X.—FINAL PROVISIONS.

SECTION 50.

Contracts for deliveries of potash salts which are concluded before July 1, 1925, with effect beyond December 31, 1925, are invalid.

SECTION 51.—*Provisions relative to enforcement.*

The Federal Council issues the orders required to enforce the law; it especially has the authority to promulgate further controlling provisions, by which the observance of the provisions of this law are secured. It has to establish the principles for the equalization to be effected as per section 8, paragraph 5, for the determination of the quota (secs. 9 to 12), and to make provision for the election of the members, the organization and method of procedure of the appor-

tioning office, and of the appeal commission and the reimbursement of expenses (sec. 28, par. 2).

The Imperial Diet is to be kept informed of all the decisions, provisions, and orders issued by the Federal Council relative to this law.

SECTION 52.—*Time of entering into force of the law.*

This law enters into force on the day of its publication.

Authenticated under our own august signature and affixed imperial seal.

Issued at the New Palace, May 25, 1910.

[SEAL.] WILLIAM.

VON BETHMANN HOLLWEG.

EXHIBIT E.—ITALIAN LAW CONCERNING THE ESTABLISHMENT OF A COMPULSORY ASSOCIATION FOR THE SICILIAN SULPHUR INDUSTRY, JULY 15, 1916.[1]

Victor Emanuel III, by the grace of God and by the will of the nation, King of Italy.

The Senate and the Chamber of Deputies have approved; we have sanctioned and we promulgate what follows:

CHAPTER I. ORGANIZATION, PURPOSE AND FUNCTIONS OF THE ASSOCIATION.

Article 1. From August 1, 1906, the owners or possessors and operators of the present and future sulphur mines of Sicily are constituted by law an association for a term of twelve years under the name of Compulsory Association for the Sicilian Sulphur Industry.[2]

Article 2. The association has the purpose of selling the crude sulphur for the common account and profit of all the members of the association.

The association must not refuse to sell the sulphur to any one who demands it for export to Italian and European markets, disposing of the sales in a manner to satisfy all demands of purchase.

The price shall be the same for all and shall be fixed by periods, according to the standards which shall be determined by the regulations.

Furthermore, the association aims:

(1) To provide, with capital extraneous to the association, for the organization of an independent enterprise for the establishment and operation of general warehouses for sulphur in the ports of Catania, Porto Empedocle and Licata, and, when necessary, in other ports of the island.

(2) To contribute without repayment according to article 23, a capital of 2,000,000 lire for the establishment of an independent mining credit bank for Sicily, which may make loans to the pro-

[1] No. 333. Legge portante provvedimenti e l'istituzione di un consorzio obbligatorio per l'industria solifera siciliana. 15 luglio 1906. Raccolta ufficiale delle leggi e dei decreti del regno d'Italia. 1906.

[2] Consorzio obbligatorio per l'industria solifera siciliana.

ducers at rates not greater than 5 per cent with the crude sulphur or other equivalent as security.

(3) To establish in conformity with article 13 a special fund to cover sickness and superannuation pensions to the laborers in Sicilian sulphur mines.

The association in so far as it shall have need of employees shall, as a rule, give preference to those of the Anglo Sicilian Sulphur Company.

Article 3. The possessors of crude sulphur stocks, existing in Sicily on August 1, 1906, and in quantity greater than 15,000 tons, must, within the first ten days of the said month, declare if they intend to consign their sulphur to the association for all the purposes of the preceding article or to sell it to the said association.

In the second case the price of the sulphur placed on board in the ports of loading, shall be calculated at the fixed rate of 59 lire per ton, whatever the quality, according to the recognized commercial practices and always without mixture of foreign substances and of roasted sulphur. This shall be paid directly to the vendors by issuance at par of obligations of the nominal value of 500 lire to the emission of which the association is authorized within the limits of the corresponding purchases.

Such obligations shall bear interest at 3.65 per cent net, exempt from all imposts, present and future, payable semi-annually on February 1st and August 1st each year; and they shall be repaid by the association within 12 years, by means of annual drawing of lots not less than one-twelfth each. The lots shall be drawn on July first, commencing in 1907.

The said obligations are guaranteed by the State with respect to both capital and interest and shall not be issued without the signature of the government inspector according to the regulations.

If in the period indicated above, the declaration is lacking, adhesion to the association is considered to have occurred.

In case the Anglo Sicilian Sulphur Company prefers to sell, the association, according to the conditions prescribed in the present article, shall pay for the stocks existing on August 1, 1906, according to the books.

For the guaranty of the quality of the sulphur given up of which delivery is made gradually at the demand of the association until all of it is consigned, which shall be accomplished not later than July 1, 1907, there shall remain as security in the treasury of the Bank of Sicily up to that date, a tenth part of the obligations issued, the interest of which, however, shall be received by the sulphur company.

The expenses of custody incurred by the said company up to the consignment of the sulphur shall be reimbursed by the association within the limits of the contracts made by it with its warehousemen.

Regarding the sales made by the said company for consignment up to July 31, 1906, the association must respect the local customs.

Those who on August 1, 1906, shall possess stocks of sulphur less than 15,000 tons shall be free to sell them; but, within the first ten days of that month, they must report the quantity; afterwards, according as they shall make them, report the respective sales in such manner that they may be controlled by the association.

Article 4. The sulphur destined for the agriculture of the country, to be identified in the manner and with the security which shall be fixed by royal decree, shall be sold by the association at a price not greater than the average of that indicated in the market reports of the three preceding years diminished by 5 per cent.

The by-laws shall fix the rules and the guaranties for the eventual limitation of production when the conditions of the market render it necessary.

The limitation shall always be subject to the approval of the Minister of Agriculture.

Article 5. During the whole period covered by Article 1, the right to sell sulphur covered by article 2, belongs exclusively to the association, save the exception in the last paragraph of article 3.

Sulphur shall not be allowed to be loaded in the ports of Sicily, without a special demand of the association, and it shall not be allowed to be transported by railway or in other vehicles of the island unless sent to the warehouses mentioned in Article 21, or unless the demand for the shipment be made by the association.

In the regulations mentioned in Article 28, shall be determined both the form and extent of the penalties for the violation of this article.

Article 6. The sales, grants, hypothecations, assignments of sulphur and other similar acts, also if they occurred prior to the enactment of the present law produce in relation to the association merely the effect to substitute the purchasers, grantees, mortgagees and the like in the rights, exclusive of the right to vote, and in the obligations which their legal predecessors had towards the association.

The association within the limits of the existing stock for the account of the vendors and excepting the deductions mentioned in Article 13, must not refuse the consignment of sulphur sold under contract of certain date before July 1, 1906, when the said sulphur is really destined to the industry of the island or to exportation, and the purchaser pays promptly the agreed price, deducting the discounts according to the local customs, in so far as payment to the vendor is provided by the contract. The differences will be charged against the vendors by the association.

For this purpose it is obligatory that the contracts of sale be reported to the association up to August 15, 1906.

Article 7. The members of the association can with the authorization of the association use, or alienate to third parties, their crude sulphur or their sulphur earth in order to apply it in the island to the manufacture of industrial products.

The association has the right to supervise such use and to recover the deductions mentioned in Article 13, in proportion to the sulphur used.

Article 8. The members of the association vote either according to number or according to participation; in the first case each of them has one vote; in the second, the right of voting and the number of votes, depends on the extent of the participation which he has in the association.

In the first year the operator has according to participation one vote for each group of ten laborers employed in his mine, according to the number resulting from the report made on December 31, 1905, to the compulsory syndicate for industrial accidents; the share of the

proprietor or possessor of the mine is rated at one-fifth of that of the operator.

In the succeeding years the participation is in the proportion of one vote for every 100 tons of sulphur received by the association in the warehouses mentioned in Article 21.

The various quotas in a mining operation or the various quotas of ownership or possession of the same should be represented by a single person. The representation belongs to the person having the greatest interest if it has not been conferred on another interest according to Article 678 of the Civil Code.

Article 9. The association is administered by a committee of delegates, composed of 50 members, on whom are conferred the powers of a general assembly; by a council of administration composed of nine titular members and four alternates, and by the director general.

The director general is nominated by the government of the King.

The minister of agriculture, industry and commerce, the general council of the Bank of Sicily, and the chambers of commerce of Palermo, Catania, Girgenti and Caltanissetta nominate from outside of the members of the association and outside of their own membership, and of those who receive from their funds, salaries, allowances or even transitory compensation, as follows:

the first and the second, each, two members of the committee of delegates and a titular and alternate member of the council of administration,

and the others, by a majority of all votes combined, two members of the committee of delegates and only one titular member of the council of administration.

The other members of the committee of delegates and of the council of administration are elected by the association, from among themselves by secret vote.

Half are elected by voting according to number, and the other half by voting according to participation.

In the substitutions one proceeds with the system with which the alternate has been elected.

That one is elected who has obtained more than half of the votes and not less than one-third of the votes of all the members. If no one has received that number, a ballot is taken of those who have had the most votes and the majority decides.

Article 10. As soon as the present law shall be published the Government of the King shall nominate a commissioner, who, having compiled the list of the members of the association according to Article 8, shall promptly publish it in the judicial announcements of the prefectures in the various mining provinces of the island and in the official records of the communes in whose territory the mines are situated.

The participants can make complaints in the first instance to the said commissioner within five days after such publication and in the second instance to the minister of agriculture, industry and commerce, within five days after notification of the decision of the commissioner which shall be made by extract through the communal officials.

Appeal against the decision of the minister is not admitted.

Article 11. The commissioner, together with the special committee mentioned in Article 29, shall prepare the scheme of by-laws for the

association and submit them to the examination of the committee of delegates.

The by-laws are approved by royal decree after examination by the minister of agriculture, industry and commerce and consultation with the commission mentioned in Article 30, the council of state and the council of mines.

Article 12. The by-laws shall determine the principal office and the branch offices of the association;

the rights and the obligations of the members;

the measures to carry out the purposes of the association;

the rules of administration, the powers and responsibility of the organs of the association and of the individual functionaries;

and whatever else is necessary within the limits of the law to facilitate the operation of the association.

Article 13. From the selling price of sulphur may be deducted only:

(1) the sum allowed by the committee of delegates for the expenses of administration, which must never exceed the limit of 1 lira per ton.

(2) the sums requisite to provide for the regulations in number 2 of article 2, and in article 23, and in the degree that is proved necessary to provide compensation mentioned in article 4, and for the consequences of eventual non-employment of laborers, arising from the limitation of production; in the aggregate not exceeding 4 lire per ton.

(3) the sum of 50 centesimi per ton.

This quota, for giving effect to the provisions of article 2, number 3, shall be paid three times a year to the treasury of the organ for the insurance of sickness and superannuation of the laborers, which shall administer the said fund according to the agreement which shall be established between the said treasury and the association.

Article 14. Controversies between the association and the members thereof concerning all the objects pertaining to the present law shall be decided by three arbitrators without appeal.

For this purpose a board of six arbitrators is established, composed of three experts in legal matters, and three in mining matters, appointees and eventual alternates, to wit, two by the minister of agriculture, industry and commerce, two by the first president of the court of appeal of Palermo, and two by the committee of delegates, which shall proceed to the nomination with limited vote.

In the decisions of every individual case not more than two experts of a given category can participate, nor more than one of those nominated by the association.

The selection of the judges shall be made at the beginning by lot and subsequently by turn.

Article 15. If the association is discontinued, its assets shall be distributed among the members of the association, in proportion to the quantity of sulphur sold for the account of each of them.

Article 16. In the regulations mentioned in article 28 the rules will be established for the governmental supervision of the association and of its organs.

Article 17. In the month of August of each year, beginning with 1907, the administration of direct taxes shall ascertain the amount of the income of the preceding operating year from the principal real

estate tax upon the sulphur mines of Sicily; the amount shall be reimbursed in favor of the association, and paid over for its account to the Bank of Sicily.

In the second half of each year, beginning with 1907, the administration of the railways of the state shall ascertain the amount of the income from rates received for the transportation of sulphur on the railways of Sicily, belonging to the State, during the preceding operating year. Under the expenses of the year it shall provide for the payment in favor of the association of a sum equal to one-half of the said amount, paying the amount to the Bank of Sicily. In no case shall such sum exceed the limit of 850,000 lire.

The association as fast as it shall sell the sulphur acquired by it according to article 3, shall pay the price to the Bank of Sicily. This like the other payments shall be entered by the bank in a special current account, in the name of the association, with a lien in favor of the State for the guarantee given to the obligations to be issued by the association, mentioned in article 3; and with a secondary lien in favor of the Bank of Sicily to reimburse it for the quota of the capital contributed by it, as provided in the first part of article 23 of this law. Such sums shall be appropriated annually for the aforesaid purposes.

The current account of the Bank of Sicily shall bear interest equal to that which the bank shall allow to its savings deposits on current interest bearing accounts.

The banking facilities of the association shall be provided gratuitously by the Bank of Sicily.

CHAPTER II. SUBSIDIARY ORGANS: GENERAL WAREHOUSES AND INDEPENDENT MINING CREDIT BANK.

Article 18. The general warehouses mentioned in number 1 of Article 2 shall be established on the basis of the law of December 17, 1882, number 1154, and of the law of December 26, 1895, number 720, in so far as they are applicable.

For providing the capital of the general warehouses shall cooperate—the Bank of Sicily, which shall deduct the amount from the reserve fund, without prejudice to the profits allowed under the paragraph of Article 50 of the law concerning issuing banks, approved by royal decree October 2, 1900, number 373—and the Central Savings Bank Vittorio Emanuele in such measure as shall be agreed upon between the association and the said institutions, subject to the approval of the minister of the treasury and of the minister of agriculture, industry and commerce. In providing the said capital, other institutions or private persons may participate.

The necessity of establishing general warehouses in other ports than Catania, Porto Empedocle and Licata, shall be determined by the committee of delegates by a vote of a three-fourths majority of the legal number present.

Article 19. In the by-laws of the general warehouses it shall be provided that they assume the obligation to prepay without interest the expenses of transportation of Sicilian sulphur from the railway stations of shipment to the places of storage, to be reimbursed on the reshipment of individual lots of sulphur.

The indebtedness for the said expenses of transportation has preference over security debt.

Article 20. Besides those indicated in the law under Article 18, the installations destined to facilitate the transportation of sulphur from the places of production to the railway stations of shipment or from those of arrival to the general warehouses or from them to on board ship, are declared to be of public utility.

Article 21. All the sulphur of the Sicilian mines shall be deposited with and put in the custody of the general warehouses, at the disposition of the association.

According to the rules and guarantees which shall be established in the by-laws

(*a*) the said sulphur, until the general warehouses are operating, may be deposited in existing private warehouses; and these may, in agreement with the association, be transformed into association warehouses, as direct branches of the general warehouses.

(*b*) the association may allow the sulphur destined for consumption in the interior of the island to be consigned to purchasers at the places of production or at the railway stations.

Article 22. For the discount rate in favor of collateral notes on sulphur deposited in the general warehouses, the Bank of Sicily is authorized to exceed up to 10 million lire the sum of 6 million lire mentioned in Article 30 of the only text of the law cited regarding issuing banks, with the exemption of the augmentation of the rate mentioned in Article 23 of the said law, on condition that the resulting excess be applied exclusively to the operations considered in this article.

Article 23. The capital of the independent mining credit bank for Sicily, mentioned in number 2 of Article 2, shall be furnished from the treasury of the State and without right of reimbursement in the sum of 2,000,000 lire, to be charged to the year 1905–1906, if the surplus of the said year, certified by the minister of the treasury, suffices to cover the indicated assignments, and with an additional two millions from the Bank of Sicily according to necessity, with interest at a prudent minimum, and it shall be reimbursed by the association rateably at the end of not more than eight years.

The Bank of Sicily shall deduct the 2 millions from the reserve fund, excepting the effects of the first paragraph of Article 50 of the law concerning banks of issue.

The Bank of Sicily from the sum destined for the establishment of the mining bank shall make to the special committee, mentioned in Article 29, the advances which will be requested for the needs of the temporary management. The part of the said advances destined for expenses of administration shall be reimbursed with the deduction mentioned in Article 13, number 1.

Over the part of the deductions mentioned in Article 13, number 2, which shall be destined to repayment, and over all the activities of the bank, the Bank of Sicily shall have the right of preference.

The by-laws of the bank shall be prepared and considered on the basis of Article 11, and approved by the minister of agriculture, industry and commerce and by the minister of the treasury.

The duties of administrator of the bank and those of administrator of the association are incompatible.

Whoever has exercised one of them cannot be nominated to the other duty, if there has not elapsed one year after leaving it.

CHAPTER III. GENERAL PROVISIONS.

Article 24. From August 1, 1906, in the special subscription tax, mentioned in Article 2 of the law of July 22, 1897, No. 317, are comprised also the registry taxes excepted by the said article and the taxes on the bills of lading of sulphur, provided for by Article 31 of the law of July 6, 1862, No. 680.

With this modification the royal decree of January 28, 1906, No. 11, is converted into law, which extends to the sulphur of the mines of the other provinces of the kingdom the provisions of the said law of July 22, 1897.

The industries of milling, milling with sulphate of copper for agriculture, refining and distilling national sulphur, are exempt from the taxes by which sulphur has been burdened, by reason of the special subscription tax.

From August 1, 1906, except the provisions mentioned in Article 42 of the law of March 1, 1886, No. 3682, the provincial and communal surtax on Sicilian sulphur is consolidated in the aggregate sum recovered for the year 1905.

The intendant of finance, in proportion to the production of each individual mine in the preceding year, shall annually make the distribution of the said sum to the various mines in the current year in the territory of the province or of the commune to which the surtax relates.

Article 25. The new commercial companies which may be established for the purpose of operating sulphur mines, industries and commercial operations in which sulphur is the principal element, are exempt from any tax whatever.

Foreign companies established to operate in Italy with the same purposes shall enjoy like exemptions throughout the duration of their operations, if they take the legal and fiscal measures to be recognized in the kingdom or establish in it a general agency or representation.

Article 26. The minister of agriculture, industry and commerce, conformably with the advice of the superior council of industry and commerce, shall concede a declaration of public utility according to the laws in force, for the works which shall be necessary for the introduction and subsequent development of those industries already existing and which shall arise in any province of the kingdom and which shall have for their object the utilization of sulphur and its derivatives, exclusive of pyrites.

Article 27. Within six months of the publication of this law the Government of the King shall present to Parliament a project of law to regulate the contracts of labor in the Sicilian sulphur mines.

Article 28. To the Government of the King is given the power, after hearing the commission mentioned in Article 30, to issue by royal decrees transitory regulations, including those temporary provisions, necessary during the provisory administration mentioned in Article 29 and all the other dispositions required for the complete execution of this law.

Regulations for the execution of this law shall be published within three months from the date of the same.

CHAPTER IV. TEMPORARY PROVISIONS.

Article 29. For the execution of this law the representation and administration of the association are entrusted temporarily to a special committee, composed of the commissioner mentioned in Article 10, who presides over it and executes its determinations, and of four members nominated by the Government of the King. The committee shall proceed with the rules and means which shall be established by royal decree.

The functions of the commissioner and of the special committee shall cease from the day of the seating of the new administrators elected according to the by-laws already approved.

During this period the chambers of commerce and trades and the communes of the island must give promptly gratuitous execution to all the requests of the commissioner.

Article 30. Near the minister of agriculture, industry and commerce, there shall be a commission composed of five members nominated by royal decree. This shall give advice concerning the by-laws of the association, concerning the regulations for the execution of this law, and concerning all the other questions which the minister himself shall submit to its examination.

We order that the present, furnished with the seal of State, be inserted in the official collection of laws and decrees of the Kingdom of Italy, commanding every one concerned to observe it and to cause it to be observed as the law of the State.

Given at Racconigi, on July 15, 1906.

VICTOR EMANUEL.

(Seal:) The Keeper of the Seal, GALLO.

F. COCCO ORTU.
A. MAJORANA.
MASSIMINI.
GIANTURCO.

EXHIBIT F.—RUSSIAN LAWS REGULATING THE PRODUCTION AND SALE OF SUGAR.[1]

LAW OF NOVEMBER 20, 1895.

The Imperial State Council in its session of the united departments, after considering the proposition of the Finance Minister, "concerning certain regulations with respect to the sugar industry," decrees that the following provisions apply respecting the sugar production in the campaigns of 1895–96, 1896–97, 1897–98:

ARTICLE I. For each campaign of sugar production the committee of ministers on the proposal of the Minister of Finance determines:

(*a*) The quantity of sugar, which is to be brought on the domestic market by the granulated sugar factories and the beet sugar refineries.

(*b*) The quantity of an unconditional inviolable stock of sugar of the said factories.

[1] Translated from the German translation of Preyer, Die russische Zuckerindustrie, Leipsig, 1908.

(*c*) The limit price of sugar for the domestic market up to which the said stock remains inviolable and the conditions under which sugar may be brought on the domestic market from this stock.

ARTICLE II. The sugar produced in each campaign by granulated sugar factories and beet sugar refineries which exceeds the quantity determined for the domestic market (Article I, *a*), is regarded as surplus and is subject to a special additional tax of 1.75 roubles per pood besides the sugar tax (consumption tax).

ARTICLE III. This surplus (Article II) is reckoned for the individual factories, according to the quantity of production which exceeds 60,000 poods.

Note 1. To the Finance Minister is left:

(*a*) To fix the method by which the current and definite computations are to be made for the determination of the surplus for the factories.

(*b*) To determine, which products can be taken for the computation of production in the determination of the surplus and which can be transferred from the surplus to the inviolable stock (Article IV).

Note 2. If in the computation of the surplus in the campaign of 1896–1897 it shall appear that by individual factories sugar has already been brought on the market from the surplus, then for these factories equal quantities of sugar are reckoned in the surplus for the following campaign. In such case this quantity is to be deducted from the production of the general surplus of the campaign 1896–1897.

ARTICLE IV. The unconditional inviolable stock (Article I, *b*) is formed in each campaign from the general surplus and is completely maintained from this. For the individual factories this stock is reckoned in the quantity of the general surplus on the basis of the regulations contained in Article III.

Note. For the security of the current payment of the tax in the amount of 75 kopecks on the sugar which is brought on the market by the factories, the sugar transferred to the inviolable reserve is taken over by the State at a price and under conditions which are to be fixed by the Finance Minister.

ARTICLE V. The existing sugar surplus of the factories (in excess of the required unconditional inviolable stock) may be brought on the domestic market only after full payment of the additional tax. The sugar tax for this sugar is paid according to the general provisions for sugar of the current campaign. It is suggested, however, that the manufacturer leave this sugar in storage in the factory as a free stock, and in this case he does not need to pay either the sugar tax or the additional tax until it leaves the factory.

Note. The existing free stock of sulplus sugar of a factory at the end of a campaign can upon the request of the manufacturer be reckoned in with the production of the next campaign in this factory with cancellation of the computation of the surplus.

ARTICLE VI. The sugar stored in a factory in the inviolable stock is subject neither to the sugar tax nor to special taxes before leaving the factory, which, however, is allowed only under the conditions provided in Article VII. The sugar held in the inviolable stock must be unconditionally replaced in every period by sugar of new production.

Note. In case of the closing down of a factory its existing inviolable stock is at the disposition of the manufacturer at the close of the campaign. He is obligated either to export it abroad (Article IX) or, if he brings it on the domestic market, to pay the sugar tax according to the general provisions of the following campaign, as well as the additional tax. The payment of both taxes by the manufacturer must also take place in case of forced sale.

ARTICLE VII. If the sugar price in the domestic market shall exceed the limit prices (Article I, *c*) the Finance Minister ordains that the requisite quantity of sugar from the inviolable as well as from the free stock to be brought upon the domestic market until the price falls. For this sugar the payment of the additional tax is not requisite, but only the sugar tax for sugar of the current campaign.

ARTICLE VIII. In case the sugar existing in the inviolable or free stock falls below without fault of the manufacturer, the Finance Minister is empowered not to bring this sugar into the reckoning for the quantity fixed for the factory and to remit the payment of the sugar tax and the additional tax for him.

ARTICLE IX. In the case of exports abroad from the sugar surplus such sugar is entirely exempt from the payment of the sugar tax and the special additional tax.

Note. In case the sugar price shall so increase on the foreign European markets that this advance operates as a stimulus to a considerable overproduction by our factories, the Finance Minister is empowered to submit a proposal to the committee of ministers to the end of suspending temporarily the freeing of the exported sugar either wholly or partially from the additional tax.

ARTICLE X. From the granulated sugar factories as well as from the beet sugar refineries, sugar may be shipped only with the permission of the tax inspector who must certify with his signature the observance of the legal regulations.

ARTICLE XI. Manufacturers who in an unauthorized manner bring sugar upon the market from the unconditional inviolable stock as well as from the surplus without payment of the sugar tax, and further owners of refineries and dealers who acquire such sugar unlawfully brought upon the market, are to be brought to account according to Article 1096 of the provisions regarding consumption taxes and internal taxes.

ARTICLE XII. The Finance Minister has the authority, in accord with the State Comptroller:

(*a*) To issue regulations regarding the bookkeeping of the individual factories respecting the additional tax affecting the sugar surplus.

(*b*) To fix the method for reckoning the surplus of the individual factories and for establishing the unconditional inviolable stock, as well as to make regulations concerning its preservation in the factories and its liberation on the market.

(*c*) To issue regulations for exportation.

(*d*) To give all instructions and explanations which shall become necessary respecting the application of this law.

CONCLUSION. His Imperial Majesty, after approval of these regulations by the State Council in general session, has given them his august confirmation and commanded their execution.

AMENDMENT OF MAY 11, 1898. DECISION OF THE STATE COUNCIL IN ITS ASSEMBLED DEPARTMENTS.

ARTICLE I. The temporary provisions of the law of November 20, 1895, confirmed by august decree, regarding the sugar industry shall continue in effect until further notice with the following addition:

The Finance Minister is empowered to make regulations concerning what products of those which at the end of each campaign remain as surplus at the factories can be reckoned by the manufacturers to the production for the new period, after deducting from the quantity of the surplus, and to what extent this may occur, beginning with the surplus of the campaign 1897–98.

ARTICLE II. Note 2 of Article III and the Notes to Article V of the said law are abolished.

LAW OF MAY 12, 1903. CONCERNING CHANGES AND SUPPLEMENTS TO EXISTING LAWS REGARDING THE SUGAR INDUSTRY.

ARTICLE I. In changing and supplementing the existing laws it is provided:

1. For each annual campaign the extent of the general normal (useful) sugar production is fixed by the committee of ministers according to the proposal of the Finance Minister.

2. If the quantity of the actual sugar production for a given campaign does not exceed the general normal (useful) production, then the surplus of the actual production over the quantity fixed for the domestic market is to be allotted to the individual factories in proportion to their actual production which exceeds 80,000 poods.

3. If the quantity of the actual sugar production for a given campaign is greater than the general normal (useful) production, then the surplus of the actual production over the quantity fixed for the domestic market is to be apportioned as follows:

(*a*) The part of the surplus which is expressed by the difference between the actual and the general normal (useful) production is apportioned exclusively among the factories which have exceeded the quantities apportioned to them from the normal (useful) production (see No. 4), and indeed in proportion to the excess incurred by each individual factory.

(*b*) The part of the surplus remaining over is apportioned to all factories in proportion to the actual production of each individual factory which exceeds 80,000 poods. In this case, however, the surplus computed according to paragraph *a* is to be deducted first.

4. Under the normal (useful) production of each factory for a campaign is to be understood the quantity which is obtained through the apportionment of the general normal (useful) production to the individual factories corresponding to their productive capacity. The normal production of a factory may not be placed under 80,000 poods.

5. In order to compute the productive capacity of an operating factory the extent of its actual production in the last ten campaigns is taken as a basis. From this is to be deducted:

(*a*) For the campaigns 1896–97 to 1902–03: The quantity of sugar which has been included from the free stock of a preceding campaign in the production of the following campaign.

(*b*) For the campaigns from 1903–04 on:—the surplus computed according to No. 3 (*a*).

6. The productive capacity of the factories named under 5 is fixed as follows:

For factories which have been in operation eight or more years—as the arithmetical mean of the production of the three largest years.

For factories which have been in operation from five to seven years—as the arithmetical mean of the production of the two largest years.

For factories which have been in operation from two to four years—as the largest production.

For factories which have been in operation one year—as this production.

7. The productive capacity of newly established factories and of such old ones as were temporarily not in operation in the course of the last ten campaigns is fixed for the first campaign or the resumption of activity according to their actual production in this campaign, but not higher than 160,000 poods.

8. The productive capacity of factories which have been enlarged for the purpose of extension of operations is fixed according to the regulations which have been established for existing factories (Articles I, 5 and 6), or in case of a special application from the manufacturers according to the regulations for newly established factories (No. 7 and Article V).

9. The unconditional and inviolable stock is computed for the individual factories:

(*a*) In case the actual production does not exceed the general, normal production upon the basis of No. 2.

(*b*) In all other cases upon the basis of No. 3b.

10. The existing free stock of sugar at a factory at the end of a campaign at the request of the manufacturer in the quantity specified by him is reckoned in with the production of the new campaign. This provision extends to the free stock of sugar which remains over at the end of the campaign 1902–03.

11. The stone buildings of the granulated sugar factories and beet sugar refineries now in operation which are situated outside of the capital, in order to assure the payment of the sugar tax on the basis of paragraph 4 of section 9 of appendix I to Article 339 of the regulations concerning consumption taxes, are taken as pledge with the special permission of the Finance Minister in each individual case.

ARTICLE II. Paragraph 3 of the note to Article 996 of the regulations concerning consumption taxes is abolished.

ARTICLE III. With respect to such of the newly erected factories whose equipment was begun before the publication of these regulations in the "Collection of Laws and Government Ordinances" and whose production begins not later than with the campaign of 1904–05, the restrictions of Article I, No. 7, have no application. The productive capacity of these factories in the first period of their activity is to be reckoned equal to their actual production in this time.

ARTICLE IV. In the determination of the productive capacity of the factories for the campaigns 1903–04 and 1904–05, the production of the years prior to the campaign 1895–96 is not to be brought into reckoning.

ARTICLE V. The productive capacity of the factories, which in the years 1900–01, 1901–02, and 1902–03, have been enlarged with the purpose of extension of their operations, for the campaigns 1903–04, 1904–05, and 1905–06, upon special application of their owners is to be made equal to the product of the mean sugar production of 24 hours of each of these factories in the campaign 1902–03, multiplied by the arithmetical mean of the working days of all factories in the Empire during the same period.

ARTICLE VI. The Finance Minister is empowered, with the assent of the State Comptroller, to establish regulations in applicable instances for:

(*a*) The method of application of the provisions made in Article I, Nos. 3–10, as well as in Articles III and V, also.

(*b*) The conditions under which the productive capacity of the factories mentioned in Article V can be reckoned, according to the provisions for newly erected factories as well as according to the provisions in the article cited.

ARTICLE VII. For a period of three years (1903–04–1905–06) the following provisions are made:

1. The Finance Minister is empowered on special request of the factories to allow that denatured sugar for cattle fodder and for technical purposes be brought on the domestic market without payment of the sugar tax and additional tax.

2. The conditions under which the manufacturer is allowed the use of the privilege mentioned in the preceding number are to be fixed by the Finance Minister in agreement with the Minister of Agriculture and the State Comptroller. These conditions are to be laid before the Senate by the Finance Minister which will publish them for general information.

3. The denatured sugar mentioned in No. 1 is not to be reckoned in the quantity which is determined for each campaign for the domestic market.

ARTICLE VIII. The regulations contained in Article I, Nos. 1–10 and in Article III–V, take effect from September 1, 1903.

EXHIBIT G.—ROUMANIAN LAW CONCERNING THE APPORTIONMENT OF THE TOTAL REQUIREMENTS OF ILLUMINATING PETROLEUM AMONG THE REFINERIES OF THE COUNTRY.[1]

[Law of April 10 (O. S.), 1908.]

CHAPTER I. APPORTIONMENT OF THE REQUIREMENTS.

Article 1. The government is empowered by the present law to apportion the total requirements of illuminating petroleum among the existing refineries or those to be organized in the future.

Article 2. The apportionment takes place on the basis of the productive capacity of each refinery. The productive capacity is determined according to the quantity of crude oil, which a refinery can refine in one year.

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[1] Translated from the German text in Denkschrift ueber das Kartellwesen, IV. Teil, Berlin, 1908, pp. 151–4.

Article 3. The refineries which are not in a position to refine more than 40,000 tons of crude oil annually, shall in the apportionment receive an addition of 200 per cent in relation to their productive capacity over against the refineries, which consume more than 40,000 tons annually; those which can not refine more than 10,000 tons annually, shall in relation to their productive capacity receive an addition of 400 per cent over against the refineries which annually refine more than 40,000 tons of crude oil.

Article 4. The operation of such refineries, which are not able to produce illuminating petroleum as prescribed, is strictly forbidden. The existing refineries, which do not comply with these conditions, are excluded, and operation shall not be permitted until they provide themselves with the necessary apparatus for producing illuminating petroleum according to the existing ordinances or such special ordinances as shall be promulgated.

Article 5. Each year, in the month of April, the Minister of Finance submits to the Council of Ministers a report on the apportionment of the total requirements among the existing factories, which are in a position to produce petroleum in the prescribed manner. After approval of the apportionment by the Council of Ministers, the Minister of Finance allots to each refinery that part of the annual consumption which falls to it.

With the surplus of production the following method is pursued: if it is exported, the refinery must prove the export by means of the bills of lading and with other proofs, which are demanded by the controlling officers from the Ministry of Finance. If the surplus is not exported, it must be stored in a warehouse or in a special reservoir of the manufacturer under the seal of the official of the Ministry of Finance who is stationed at each factory for the purpose of collecting the State and local taxes.

Article 6. If a refinery should cease to operate, or if it can not or will not market its proportionate share, as it is determined by the government, the other refineries must assume the delivery in its place in proportion to their participation in the total requirements. Likewise the excess, which results in consequence of the above-mentioned causes, as well as the surplus, which is determined by the increase in the anticipated consumption at the beginning of the fiscal year, is apportioned according to articles 1, 2 and 3 above, and the Ministry of Finance will notify each refinery of the share allotted to it.

Chapter II. Selling Price.

Article 7. The government establishes the maximum price, at which all refineries are obliged to sell illuminating petroleum. This price, which is computed when the petroleum leaves the factory, is established on the following basis for 100 kilograms: An amount of from 3.50 to 4.60 lei is established, which represents the cost of refining and the profit of the manufacturer; to this amount is added the average price for 100 kilograms of crude oil delivered to the factory; the sum of these two amounts forms the maximum selling price, which is prescribed for all refineries.

Article 8. This price is established during the month of April for the three succeeding months, and is retained as long as the average

price of crude oil remains unchanged. If the price of crude oil after the expiration of the three months should be changed, either increased or reduced, then the maximum selling price will also be changed accordingly.

Article 9. The price as well as the changes in price, are fixed by the Council of Ministers on the basis of the report of the Minister of Finance, and are brought to the attention of the refineries by him.

CHAPTER III. FINES.

Article 10. The owner of a refinery, who during a year markets more than the share that was allotted to him by the Minister of Finance, is liable to a money fine, which represents a hundred times the value of the excess quantity of petroleum which he markets.

The agent stationed by the Ministry of Finance at the factory, who has made himself guilty of such an offence, will be dismissed, sentenced to two months imprisonment and loss of right ever again to hold any public office.

The owner of a refinery, who makes himself guilty of the same offense for two succeeding years, will be condemned to the above-mentioned fine and besides to the closing of his factory for three months, besides to a loss of one-fourth of his annual share in the consumption of the year in which the offense has occurred.

Article 11. Whoever markets illuminating petroleum which does not come up to the regulations shall be punished with a fine of from 2,000 to 5,000 lei.

In case of repetition of the offense he will be punished with a double fine, and in case of a second repetition with a double fine and with closing of his factory.

The representatives of the government, who have been in a position to exert a control over the quality of petroleum and who nevertheless have permitted the offense, will be dismissed and will lose the right ever to hold public office again.

Article 12. Whoever mixes residuum with benzine, in order to market this mixture as illuminating petroleum, will be punished with a fine of 5,000 to 10,000 lei and three months imprisonment.

In case of repetition of the offense his business, of whatever nature it be, will in addition be permanently closed.

The informers of such frauds will receive 75 per cent of the sum collected.

Article 13. The owners of refineries, who from their place of business sell petroleum at a higher price than the maximum price established by the government, will be punished with a fine of from 2,000 to 10,000 lei.

In case of repetition of the offense they are punished with a double fine and the money fines are doubled in each new case of repetition.

Article 14. The punishments established by this law are inflicted as follows:

(1.) Relative to the dismissals, by the Minister to whom the guilty official is subordinated.

(2.) Relative to the money fines, by the Minister of Finance, on the basis of the minutes which establish the offense. In this case the condemned has the right of appeal to the court within fifteen days

from the time when the approved minutes were delivered. The court renders the decision in a speedy trial and definitely; an appeal is not permitted.

(3.) Relative to the prison fines and the right to again hold public office, the offenders are summoned before the court, which decides in a speedy trial. Legal means are allowed.

Chapter IV. Reservoirs for Retail Sale.

Article 15. In so far as the refiners do not build reservoirs at their own expense for the storage of illuminating petroleum at the railroad stations and the harbors, in order to spread the consumption as much as possible and to furnish the petroleum as cheaply as possible to the public, the Ministry of Finance is authorized to build such reservoirs at the expense of the State, according to the pattern of those which have been erected prior to the promulgation of this law by some of the refiners; for this purpose the Minister of Finance shall demand the necessary credits in the budget.

The rent at which the State will place at the disposal of the public the reservoirs leased by it, shall amount to only 5 per cent of the cost and 5 per cent for amortisation.

Article 16. All these reservoirs, whether they have been erected prior to the promulgation of the present law or later by the State or by the refineries, are obliged to deliver to each buyer a minimum amount of 150 kilograms illuminating petroleum in a barrel; they are entirely free to sell also smaller quantities.

Transitional regulations.

Article 17. The present law takes effect at the latest on October 1, 1908. The first division of the consumption as it is determined in Chapter I, and the first price which is to be fixed for three months according to Article 2, will be determined as an exception in that month, which precedes the promulgation of the law.

EXHIBIT H.—BRAZILIAN COFFEE VALORIZATION; AGREEMENTS, LAWS, ETC.[1]

CONVENTION OF TAUBATÉ.

(Agreement Made by the States of Rio de Janeiro, Minas Geraes, and S. Paulo for the Valorization of Coffee, the Regulation of the Trade, the Promotion of an Increase in the Consumption, and the Creation of a Conversion Bureau Fixing the Value of the Currency.)

Article 1. During such a period as may be convenient the contracting States obligate themselves to maintain in the domestic markets the minimum price of 55 to 65 francs (gold, or Brazilian currency at the rate of exchange of the day) per bag of 60 kilos for the American type No. 7 in the first year; this minimum price may later be raised to a maximum of 70 francs, in accordance with what the market warrants. For the higher grades, according to the American classification, the prices indicated will be increased proportionately during the same periods.

Article 2. The contracting Governments will by suitable means seek to hinder the exportation abroad of coffees inferior to type No. 7 and to favor so far as possible the development of their consumption at home.

[1] From translations in U. S. *v.* Herman Sielcken et al., Petition in equity, Southern District of New York, 1912.

Article 3. The contracting States bind themselves to organize and maintain a regular and permanent service of coffee propaganda, with the object of increasing the consumption by the development of the present markets, the gaining of new ones, and the defense (of coffee) against frauds and falsifications.

Article 4. The contracting Governments, when they consider the time opportune, shall establish national (Brazilian) types of coffee, promoting the creation of exchanges or brokers' associations for dealing in such types. The prices referred to in article 1 will then be fixed in accordance with the new types.

Article 5. The producers of coffee will have facilities offered them for the improvement of the quality of their product by remilling.

Article 6. The contracting Governments obligate themselves to create a surtax of three francs, subject to increase or reduction, upon each bag of coffee exported from any of the (contracting) States, and also to keep in force the laws which hinder, by a sufficiently high tax, the increasing of the areas planted with coffee in their territories, for a period of two years, which may be prolonged by mutual agreement.

Article 7. The product of the surtax mentioned in the previous article, payable when the coffee is exported, will be collected by the Federal Government and reserved for the payment of the interest and amortization of the capital necessary for the carrying out of this agreement, any balance remaining being applied against the expenses incurred in this service. The collection of the surtax is to begin after article 8 has been complied with.

Article 8. For the execution of this agreement the State of S. Paulo is hereby authorized to undertake, at home or abroad, with the guarantee of the surtax of three francs mentioned in article 6, and with the joint responsibility of the three States, the necessary credit operations to provide a capital of up to fifteen millions sterling, which will be used as a ballast for the bureau of gold emission and conversion to be created by the National Congress for the fixing of the value of the currency.

1. The product of the emission upon this ballast will be applied, as provided in this agreement, to the regulation of the trade in coffee and to its valorization, without prejudice to the conversion bureau to make applications for other purposes as provided by law.

2. The State of S. Paulo, before completing the credit operations mentioned above, will submit the conditions and clauses to the Federal Government or the other contracting States for their approval.

3. In case it should be necessary to obtain the endorsement or the guarantee of the union for these credit operations, article 2, No. 10, of Law No. 1452, of the 30th December, 1905, will be complied with.

Article 9. The organization and direction of all the work which this agreement provides for will be entrusted to a committee of three members, one being named by each State, a fourth member, selected by the three States, acting as president and voting only in case of a tie(?), when his vote is the deciding one.

Each director will have a substitute, also named by the respective States, who will take his place when he can not be present.

Article 10. The committee mentioned in the previous article will arrange all the work and appoint all assistants necessary for the

execution of the agreement, but may entrust the work in part to some national association or company, under its immediate control, all in accordance with the regulations.

Article 11. The office of the directing committee will be in the city of S. Paulo.

Article 12. For the execution of this agreement the committee will draw up the necessary regulations, which will be submitted to the contracting States for their approval. They must give their opinion within 15 days, and failure to do so is considered equivalent to approval.

Article 13. The advantages resulting from this agreement will be divided among the contracting States in proportion to the amount of surtax collected by each, as provided for in the regulations.

Article 14. The contracting States recognize and accept the President of the Republic as arbitrator in any question that may arise among them in the execution of the present agreement.

Article 15. The present agreement will take effect on the date of its approval by the President of the Republic, in accordance with No. 16 of Article 48 of the Federal Constitution.

Executed in the city of Taubaté, February 26th, 1906.

(Signed) NILO PEÇANHA,
FRANCISCO SALLES, and
JORGE TIBIRIÇA.

STATE LAW NO. 990 OF JUNE, 1906, APPROVING THE TAUBATÉ AGREEMENT AND PROVIDING FOR ITS EXECUTION.

The president of the State of S. Paulo.

I hereby make known that the State legislature has decreed and I promulgate the following law:

Article 1. Approves, in all its clauses, the agreement made on the 26th of February of the present year, in Taubaté, by the president of the State with the presidents of the States of Minas Geraes and Rio de Janeiro for the valorization of coffee and the developing of its consumption, as well as to work for the creation by the Federal Government of a conversion bureau for paper money and the fixing of its value.

Article 2. The executive of the State is hereby authorized to determine when to begin the collection of the additional tax in currency equivalent to three francs gold, at the rate of exchange of the day, upon each bag of coffee of 60 kilos exported, and also to decide with reference to the exportation of low grade coffees, ex-vi articles 28, paragraph 6, and 29 of Law No. 984 of 29th December, 1905.

Article 3. In accordance with clause 7 of the Taubaté agreement the executive of the State is authorized to transfer to the Federal Government the right to collect the additional tax referred to in the preceding article, to be used in paying interest and amortization on the loan to be contracted for the purpose of emitting convertible gold (notes), and fixing the value of the paper currency.

Article 4.—For the carrying out of the present law or of the clauses of the Taubaté agreement the executive of the State is authorized to contract, at home or abroad, a loan of a maximum of fifteen million pounds sterling.

The executive is also authorized to open the necessary credits to cover the preliminary expenses with reference to the said Taubaté agreement.

Article 5.—Contrary provisions are hereby repealed.

The secretary of the interior will have the above executed.

Palace of the Government of the State of S. Paulo, 4th June, 1906.

JORGE TIBIRIÇA.
M. J. ALBUQUERQUE LINS.

MODIFICATIONS AND ADDITIONS TO TAUBATÉ AGREEMENT.

The Presidents of the States of Rio de Janeiro, Minas Geraes, and S. Paulo agree and resolve to modify the Taubaté agreement by the addition of the following clauses, which become an integral part of the said agreement:

1st.

For article 1 of the agreement the following is substituted:

During such a period as may be convenient the contracting States obligate themselves to maintain in the domestic markets the minimum price of 32 to 36 milreis per bag of 60 kilos of coffee, for the American type 7, in the first year; this minimum price may later be raised to a maximum of 40 milreis, in accordance with what the market warrants. For the higher grades, according to the American classification, the prices indicated will be increased proportionately during the same period.

2nd.

If the credit operations necessary for the execution of the agreement should be undertaken by the three States without the endorsement or guarantee of the Union, the surtax of three francs referred to in article 6 of the said agreement will be collected by the States and its product will be deposited for use as prescribed in article 7.

3rd.

The collection of the surtax of three francs will begin at a time to be determined by the contracting States.

4th.

As long as the bureau of emission and conversion is not established or has not begun its work the States may apply the product of the loan directly to the valorization of coffee.

5th.

The Government of the State of S. Paulo, before completing the negotiations relative to the credit operation mentioned in article 8 of the agreement, will submit the conditions and clauses that have been proposed to the Governments of the other contracting States for approval, and also to the Federal Government, in the case of endorsement by the Union, in order to determine expressly the re-

sponsibility of each in the operation to be undertaken, which depends upon that approval.

6th.

The present agreement will take effect the day it is approved as per No. 16 of article 48 of the Federal constitution.

Bello Horizonte, 4th July, 1906.

(Signed) JORGE TIBIRIÇA.
FRANCISCO ANTONIO DE SALLES.
NILO PEÇANHA.

FEDERAL DECREE NO. 1489 OF 6TH AUGUST, 1906.

Approves the agreement made by the Presidents of the States of S. Paulo, Rio de Janeiro, and Minas Geraes on the 26th of February, with the modifications contained in the agreement signed by the same Presidents on the 4th of July of the present year.

The President of the Republic of the United States of Brazil:

I hereby make known that the National Congress decreed and I sanction the following resolution:

Article 1. approves the agreement made on the 26th of February of the present year by the Presidents of the States of S. Paulo, Rio de Janeiro, and Minas Geraes, with the modifications contained in the agreement signed by the same Presidents on the 4th of July of the same year. The clause referring to the bureau of gold emission and conversion, the creation of which depends upon a resolution of the National Congress, is excluded from this approval.

Article 2. Contrary provisions are hereby repealed.

Rio de Janeiro, 6th August, 1906, 18th of the Republic.

FRANCISCO DE PAULA RODRIGUES ALVES.
LEOPOLDO DE BULHÕES.

LEGISLATION WITH REFERENCE TO THE SERVICE OF THE DEFENSE OF COFFEE.

[State Law No. 1127 of the 25th August, 1908.]

Dr. MANOEL J. DE ALBUQUERQUE LINS,
President of the State of S. Paulo.

I hereby make known that the legislative congress has decreed, and I promulgate, the following law:

Article 1. Upon the coffee which leaves the State and which exceeds nine million bags during the current crop year, which began on the 1st July, pp., nine and one-half million bags during the crop year beginning July 1st, 1909, and ten million bags during the following years, an additional tax of twenty per cent ad valorem will be collected, in the manner prescribed by the laws in force.

Article 2. The surtax created by article 29 of Law No. 984, of the 29th December, 1905, and which will apply to all the coffee which leaves the State, is hereby increased to five francs, or their equivalent in (Brazilian) currency, calculated at the official rate of exchange of the day.

Article 3. The State government is authorized to contract a loan immediately, abroad, for a maximum of fifteen million pounds stg., the product of said loan to be used for the completion of the measures necessary for the defense of coffee, and for the conversion into a consolidated debt of the various temporary credit operations undertaken with the same object in view.

1a. The loan to be contracted will have, in addition to the general guarantees, a special guarantee in the coffee which the State has acquired and still possesses, and in the product of the surtax referred to in the preceding article.

2a. The product of the sales of coffees of the State, which shall take place opportunely, shall be applied to the amortization of the loan contracted by virtue of the present authorization.

3a. The government shall stipulate in the contract for the loan the conditions as to interest and amortization, type (rate of issue), periods, exemption from tax, and such others as may be judged necessary.

Article 4. Contrary provisions are hereby repealed.

The secretary of the interior will have the above law executed. Palace of the government of the State of S. Paulo, 25th August, 1908.

M. J. DE ALBUQUERQUE LINS.
OLAVO EGYDIO DE SOUZA ARANHA.

For the execution of this law the following regulations were issued:

DECREE NO. 1661 OF 12TH SEPTEMBER, 1908.

The president of the State of S. Paulo, by virtue of the powers conferred upon him by article 36, No. 2, of the State constitution, and for the proper execution of law No. 1127, of the 25th August, 1908, hereby directs that the following regulations are to be observed with respect to coffee leaving the State.

Article 1. (The same as article 1 of the previous law of 25th August, 1908, with the following additional paragraph:)

The said additional tax of twenty per cent ad valorem shall be collected, together with the export duty of nine per cent imposed by previous laws, and with the tax of five francs.

Article 2. (The same as article 2 of the law of 25th August, 1908, but "upon each bag of sixty kilos that leaves the State.")

Article 3. The duties to which the present regulations apply shall be collected by the State customs office in Santos upon all coffees presented for shipment, the method of collecting being the same as up to the present.

Coffees destined for the port of Rio de Janeiro shall pay at the respective fiscal stations the tax of nine per cent ad valorem, as hitherto, and in addition a tax of two francs or their equivalent in currency, continuing to pay at the port of Rio de Janeiro a tax of three francs, as provided by previous regulations.

Article 4. The present regulations will take effect on the 24th of the current month of September.

Article 5. Previous regulations respecting export duties that are not contrary to the present ones will remain in force.

Article 6. Contrary provisions are hereby repealed.

Palace of the government of the State of S. Paulo, 12th September, 1908.

M. J. DE ALBUQUERQUE LINS.
OLAVO EGYDIO DE SOUZA ARANHA.

DECREE NO. 2014, DEC. 9TH, 1908.

The President of the Republic of the United States of Brazil.

I hereby make known that the National Congress has decreed and I sanction the following resolution:

Article 1. The President of the Republic is hereby authorized to guarantee, up to the nominal maximum of fifteen millions sterling, the foreign loan which the State of S. Paulo will contract in order to liquidate the operations effected for the valorization of coffee and to convert into a consolidated debt the temporary credit arrangements which were entered into with the same object in view.

Article 2. To give effect to article 1 the State of S. Paulo will obligate itself to accept and carry out the following regulations:

(*a*) The amount of the surtax of five francs on each bag of coffee exported shall be deposited weekly in an establishment which the Federal Government will designate, and shall be destined for the payment of interest and amortization of the said loan, and cannot in any way, for any reason whatever, be diverted from this purpose.

(*b*) In case the product of the surtax of five francs is insufficient, the State of S. Paulo will be obliged to make up the necessary amount at the proper time for the punctual and exact carrying out of the terms of said loan; and any surplus remaining at the end of a year shall be deposited and held for later payments.

(*c*) In the contract for the loan the stock of 6,994,920 bags of coffee which the State of S. Paulo has in the ports of Havre, New York, Hamburg, Antwerp, London, Rotterdam, Bremen, Trieste, and Marseilles may be given as a guarantee to the creditors, but in the same contract it must be specified that these coffees can be sold only by agreement of the Federal Government with the State of S. Paulo and authorization of the Federal Government.

(*d*) The amounts obtained for coffees in the stock referred to in paragraph (*c*) shall be destined exclusively for the amortization of the loan mentioned in article 1.

(*e*) If for any reason it should be convenient for the State of S. Paulo to reduce the export duty on coffee, such reduction cannot affect the surtax of five francs, which will remain unaltered.

Article 3. The State of S. Paulo obligates itself to keep in force the State law of the 25th August, 1908, until the effective liquidation of the loan, except in the case of an agreement with the Federal Government to adopt some other measure in place of the limitation of the exports of coffee provided for in the said law.

Article 4. The President of the Republic is hereby authorized to make use of, in addition to the guarantees prescribed in article 2, all others that he may consider necessary or called for by the nature of the operation referred to in article 1 of the present law.

Article 5. Contrary provisions are hereby repealed.

Rio de Janeiro, 9th December, 1908, 20th of the Republic.

AFFONSO AUGUSTO MOREIRA PENNA.
DAVID CAMPISTA.

AGREEMENT RELATIVE TO THE FISCAL COMMITTEE.

LONDON, *11th December, 1908.*

Agreement entered into this day, 11th December, 1908, by the Government of the State of S. Paulo, in the Republic of the United States of Brazil (in this instrument designated as "the Government"), represented by His Excellency Counsellor Dr. Antonio da Silva Prado, duly authorized for this purpose by power of attorney dated 14th August, 1908, or by Dr. Francisco Ferreira Ramos, to whom the said Dr. Antonio da Silva Prado transferred his powers, on the one hand; J. Henry Schroeder & Co., 145 Leadenhall Street, London (in this instrument designated as Messrs. Schroeder), and the Société Générale pour favoriser le dévéloppement du Commerce et l'Industrie en France, in Paris (in this instrument designated as "the Société Générale), on the other hand, the said Messrs. Schroeder and the said Société Générale being hereafter designated collectively as "the Bankers," an expression which, with the expressions "Messrs. Schroeder" and "the Société Générale" will indicate in the present agreement (both collectively and individually, as the case may demand) the persons or the person, the corporation or the corporations, which then or from time to time shall conduct the business of the said J. Henry Schroeder & Co. and of the said Société Générale pour favoriser le dévéloppement du Commerce et de l'Industrie en France, completing respectively an agreement dated 11th December, 1908, for the emission and sale of fifteen million pounds Stg. of five per cent Treasury bonds of the State of S. Paulo, between the Government of the State of S. Paulo, on the one hand, and Messrs. J. Henry Schroeder & Co., the Société Générale, and the Banque de Paris & des Pays Bas, on the other hand.

And the terms of the said agreement were stipulated and arranged as follows by and between the parties who sign the present.

Article 1. A committee shall be created composed of seven members residing in Europe or in the United States of America, or in part in the one place and in part in the other, of which four members and their successors will be designated by Messrs. Schroeder & Co., two members and their successors by the Société Générale, and one member and his successors by the Government, and this committee shall be duly invested by the Government and by the Bankers with plenary powers to permit it to comply with and execute the following:

A. Pay and liquidate through the bankers all the funds or any part of the funds actually due for advances made under the guarantee of all the coffee now belonging to the Government, and which is at present stored in the ports of the United States of America and of Europe, and to free the said coffee from the onus now resting upon it.

B. Pay through the bankers all insurance, storage charges, and other expenses on said coffee. The insurance will be effected by the bankers or through them.

C. Effect the liquidation of the stock of coffee in the name and for account of the Government of S. Paulo, in the manner specified by article 2.

The committee will name its president.

Article 2. A. The Government of S Paulo now obligates itself to offer for sale, through the committee, at public auctions or by sealed proposals, at the price of the day, preferably during the last six

months of the coffee crop, i. e., from January to June 30th, 500,000 bags in 1909–1910, 600,000 bags in 1910–1911, 700,000 bags in 1912–1913, etc., and 700,000 bags each following year.

B. In consequence the Government expressly concedes to the committee full and irrevocable power to determine the times of sale, the minimum obligatory quantities above mentioned, the markets in which to sell, and to make the sales in the name of the Government, exercise control over the transactions, and generally to do what is required.

C. Beyond and within the minimum quantities fixed by these figures, and at any time before the beginning of the obligatory sales, the trade may always have at its disposal the quantities which it requires at a price not lower than 47 francs per 50 kilos for good average and 50 francs for Havre type superior. The additional quantity may equal in each year the minimum obligatory quantity.

D. Should this quantity not be sufficient for the needs of the trade, the committee shall also stipulate, in agreement with the Government, the price to be asked for the additional quantity.

E. In case that, through the effect of the preceding clause, the sales should exceed the quantities annually provided for, the committee may postpone the later minimum sales if the state of the market and the statistical situation appears to warrant such delay, but only to the extent of the sales actually made in anticipation.

F. All the sales shall be made by the committee in the name of the Government of S. Paulo, under the rules for public auctions or sealed proposals; the notes of advice shall be sent to the committee, but for the State of S. Paulo.

Article 3. Any two members of the said committee shall have the right to call a meeting of the same in London, giving or sending by mail or by telegraph to each of the other members 48 hours' notice of the time and the place of said meeting. No deliberations can take place at any meeting to which the representative of the Government has not been called. For this reason the delegate of the Government must be domiciled in one of the four following ports: London, Havre, Antwerp, Hamburg.

The place fixed upon as domicile, before the present contract enters into effect, can not be changed except with the consent of the committee.

Article 4. Each member of the said committee shall have one vote. Any member absent may send his vote by telegraph or by mail, or may delegate one of the members present to vote for him. In case of a tie the vote of the president will decide.

The member of the committee representing the Government will have the right to put his veto upon any resolution of the committee, with the exception however of the decisions arrived at by the committee with respect to questions left by the present convention to its appreciation or exclusive decision. In such case any doubts raised will be submitted to the governor of the Bank of England or to any other person designated by him. The decision of the arbitrator will be considered final, and should it be contrary to the veto, the veto will be considered void and without effect, and the resolution of the committee will receive immediate and complete execution.

Article 5. Four members of the said committee will constitute a quorum for the transaction of business at any meeting of the said

committee, and a decision by a majority of the votes of the said committee, or of any quorum of the members of said committee, will be considered effective and binding on all the members, except in the case of a veto by the representative of the Government, or if he has not been notified of the meeting.

Article 6. The said committee may rent offices in London, employ a secretary and any other assistants, brokers, and other commercial agents whom it may deem necessary for the transaction of the business confided to it.

Article 7. The committee shall be formed and shall continue to act for a period of ten years from the date of the present agreement.

Article 8. The committee shall be paid one per cent upon the net product of the sales.

The said remuneration shall be divided among the members of the committee in such proportions as the committee may from time to time determine, and it will include the salary of the secretary and all the expenses entailed by its action, except brokerage, storage charges, and other expenses connected with the sale and delivery of coffee.

Article 9. The said committee will give orders for the delivery to the bankers, after deducting the expenses paid by them, in the proportion of two-thirds to Messrs. Schroeder and one-third to the Société Générale, of all receipts from the sale of said coffee after they have been received.

Article 10. The Government having decreed a law imposing an additional tax of twenty per cent upon all coffees exported from the State of S. Paulo in excess of nine million bags during the year June 30th, 1908–1909, in excess of 9,500,000 bags during the year ending 30th June, 1910, and in excess of ten million bags during any year after the 1st July, 1910, it hereby obligates itself not to revoke nor to modify this law as long as the said bonds are in circulation and not redeemed.

Article 11. In addition to this the Government obligates itself to decree any new law that may become necessary to guarantee that the limitation of exports will be strictly observed.

Article 12. The present agreement may be modified by agreement between the Government and the committee.

In witness whereof Dr. Francisco Ferreira Ramos, in the name of the Government, Baron Bruno Schroeder, in the name of Messrs. Schroeder, and Mr. Doryzon, director, in the name of the Société Générale, have affixed their respective signatures to the present.

(The signatures follow.)

(Duly sanctioned by the Federal Government, represented by José Antonio de Azevedo Castro, who also signed the agreement.)

EXHIBIT I.—GERMAN LAW AGAINST UNFAIR COMPETITION OF JUNE 7, 1909.[1]

We, William, by the Grace of God German Emperor, King of Prussia, etc., decree in the name of the Kingdom, with the consent of the Federal Council and of the Imperial Diet, as follows:

Section 1. Whoever in business affairs, for the purpose of competition, commits acts which are repugnant to good morals may be subject to an action to desist therefrom and to pay damages.

[1] Gesetz gegen den unlauteren Wettbewerb vom 7 Juni 1909; Reichsgesetzblatt 1909; s. 499.

Section 2. Under goods, within the meaning of this law, agricultural products are also to be understood, under industrial services and interests, agricultural services and interests also.

Section 3. Whoever in public advertisements or in communications intended for an extensive group of persons, makes incorrect statements regarding business relations, especially regarding the quality, the origin, the method of production or the scale of prices of goods or industrial services, regarding the kind of supply or the source of supply of goods, regarding the possession of marks of distinction, regarding the cause or the purpose of the sale, or regarding the quantity of the stocks, which are adapted to create the impression of an especially favorable offer, is subject to an action to desist from such incorrect statements.

Section 4. Whoever, with the intention to create the impression of an especially favorable offer, knowingly makes untrue statements and statements adapted to mislead, in public advertisements or in communications intended for an extensive group of persons, regarding business relations, especially regarding the quality, the origin, the method of production or the scale of prices of goods or industrial services, regarding the kind of supply or the source of supply of goods, regarding the possession of marks of distinction, regarding the cause or the purpose of the sale, or regarding the quantity of the stock, is punished with imprisonment up to one year and with a fine up to 5,000 marks, or with one of these penalties.

If the incorrect statements specified in paragraph 1 were made in a business establishment by an employee or representative, then the proprietor or manager of the concern is punishable besides the employee or representative, if the action happened with his knowledge.

Section 5. The use of names which in business dealings serve to specify certain goods or industrial services, without intending to specify their provenance, is not included under the provisions of Sections 3 and 4.

In the sense of the provisions of Sections 3 and 4, pictorial presentations and other contrivances which are calculated and adapted to replace such statements are to be regarded in the same way as the specified statements.

Section 6. If in public advertisements or in communications intended for an extensive group of persons, the sale of goods is announced, which came from a bankrupt stock, but no longer belong to such bankrupt stock, it is forbidden to make any reference to the origin of the goods from a bankrupt stock.

Violations of this provision will be punished with a fine up to 150 marks or with arrest.

Section 7. Whoever in public advertisements or in communications which are intended for an extensive group of persons announces the sale of goods under the designation of a closing out sale is obliged in the announcement to give the reason which has given occasion to the closing out sale.

Through the superior administrative authorities, after hearing given to the proper legal representatives of industry and trade, regulations may be made for the announcement of certain kinds of closing out sales, to the effect that notices regarding the reason of the closing out sale and the time of its beginning be provided at a place

to be designated by them, as well as a list furnished of the goods to be sold out.

The inspection of the list is permitted to everyone.

Section 8. Whoever in case of the announcement of a closing out sale places goods for sale, which have been procured merely for the purpose of a closing out sale (so-called replenishment of goods), is punished with imprisonment up to one year and with a fine up to 5,000 marks, or with one of these penalties.

Section 9. The announcement of a closing out sale within the meaning of Section 7, paragraph 2, and of Section 8, applies also to every other announcement which relates to the sale of goods on account of winding up business, giving up a particular kind of goods, or getting rid of a specific stock of goods from the existing supply.

With respect to season and inventory sales, which in the announcement are specified as such and are customary in regular business, the provisions of Sections 7 and 8 have no application. Concerning the number, time and duration of the customary season and inventory sales, the superior administrative authorities may make regulations after hearing the proper legal representatives of industry and trade.

Section 10. With fines up to 150 marks or with arrest is punished—

(1) Whoever, contrary to the provisions of Section 7, paragraph 1, neglects, in the announcement of a closing out sale, to give the reason which has given occasion to the closing out sale:

(2) Whoever violates the regulations issued on the basis of Section 7, paragraph 2, or in complying with these regulations makes incorrect statements;

(3) Whoever violates the regulations provided by the superior administrative authorities on the basis of Section 9, paragraph 2, sentence 2.

Section 11. By decision of the Federal Council it may be determined that certain goods in retail trade may be sold or offered for sale only in prescribed units of number, volume or weight, or with a description upon the article or its covering concerning the number, measure, weight, place of production or place of origin of the article.

For the retail trade in beer in bottles or jugs, the description of the content can be prescribed with provision of suitable limits of toleration for error.

The regulations prescribed by the Federal Council are to be published in the Imperial Gazette and laid before the Imperial Diet immediately or at its next meeting.

Conduct contrary to the regulations of the Federal Council is punished with a fine up to 150 marks or with arrest.

Section 12. Whoever in business dealings for the purpose of competition offers, promises or grants presents or other advantages to the employee or representative of a business, in order to obtain through improper conduct of the employee or representative an advantage for himself or a third person in the supply of goods or industrial services, is punished with imprisonment up to one year and with fine up to 5000 marks or with one of these penalties, unless a heavier penalty is incurred under other legal provisions.

The same punishment applies to an employee or representative of a business establishment who in business dealings demands, allows

to be promised or accepts presents or other advantages in order that he through improper conduct may give another a preference in the supply of goods or industrial services.

In the judgment, the thing received or its value is to be declared forfeited to the State.

Section 13. In the cases of Sections 1 and 3 the action to desist can be brought by every manufacturer who produces goods or services of a like or related kind, or handles them in trade, or by associations for the promotion of industrial interests, in so far as the associations as such can sue in civil litigation. These manufacturers and associations can also bring an action to desist against those who violate Sections 6, 8, 10, 11 and 12.

For compensation of the damage arising from the violation is responsible:

(1) Whoever in case of Section 3 knew or should have known the incorrectness of the statements made by him. Against editors, publishers, printers or distributors of printed periodicals, the claim for compensation of damage can be made effective only if they knew the incorrectness of the statements.

(2) Whoever intentionally or negligently violates Sections 6, 8, 10, 11 and 12.

If acts which are not permitted according to Sections 1, 3, 6, 8, 10, 11 and 12, are committed in a business establishment by an employee or representative, the action to desist therefrom may also be brought against the owner of the establishment.

Section 14. Whoever for the purpose of competition asserts or circulates facts concerning the business of another, concerning the personality of the owner or manager of the business, concerning the goods or industrial services of another, which are adapted to injure the operation of the business or the credit of the owner, is bound, in so far as the facts are not demonstrably true, to make compensation for the damage arising therefrom. The injured party may also demand that the assertion or circulation of the facts cease.

If it relates to confidential communications and if the communicant or the recipient of the communication has a rightful interest therein, then the action to desist is only permissible when the facts are asserted or circulated contrary to the truth. The claim for compensation of damages can be made only if the communicant knew or should know the incorrectness of the facts.

The provisions of Section 13, paragraph 3, have corresponding application.

Section 15. Whoever against better knowledge asserts or circulates facts contrary to the truth concerning the business of another, concerning the personality of the owner or manager of the business, concerning the goods or industrial services of another, which are adapted to injure the operation of the business is punished with imprisonment up to one year and with a fine up to 5000 marks, or with one of these penalties.

If the facts specified in paragraph 1 are asserted or circulated by an employee or representative in a business establishment, then the owner of the establishment, besides the employee or representative, is punishable, if the act happened with his knowledge.

Section 16. Whoever in business dealings uses a name of a person, a firm name or the special designation of a business establishment,

of an industrial undertaking or of printed matter in a manner which is adapted to produce confusion with the name, firm name or special designation, which another properly uses, may be made subject by the latter to an action to desist from such use.

The user is bound to compensate the injured party for damages if he knew or ought to know that the improper kind of use was adapted to produce confusion.

Equivalent to the special designation of a business establishment are such business insignia and other distinctive fittings for distinguishing the establishment from other establishments, which are used within the business circles affected as marks of distinction of a business establishment. For the protection of trade marks and the dress of goods (Sections 1 and 15 of the Law for the Protection of Trade Marks of May 12, 1894, Imperial Gazette, p. 441), these provisions have no application.

The provisions of Section 13, paragraph 3, have corresponding application.

Section 17. Whoever as employee, laborer or apprentice of a business establishment, for the purpose of competition or with the intention to do injury to the owner of the business establishment, imparts to others without authority commercial or manufacturing secrets, which are confided to him on account of his employment or otherwise have become accessible to him during the period of employment, is punished with imprisonment up to one year and with a fine up to five thousand marks or with one of these penalties.

Like penalties affect him who, without authority, for the purpose of competition makes a profit from or imparts to another commercial or manufacturing secrets, the knowledge of which he acquired through one of the means of communication specified in paragraph 1, or through his own act, contrary to law or in a manner repugnant to good morals.

Section 18. Whoever without authority, for the purpose of competition, makes a profit from or imparts to another plans or rules of a technical character, especially drawings, models, patterns, dress patterns, or recipes, which are confided to him in business dealings, is punished with imprisonment up to one year and with a fine up to five thousand marks or with one of these penalties.

Section 19. Acts contrary to the provisions of Sections 17 and 18 obligate furthermore compensation for the injury arising therefrom. Several obligors are responsible as joint debtors.

Section 20. Whoever for the purpose of competition undertakes to induce another to do an act contrary to the provisions of Section 17, paragraph 1, and Section 18, is punished with imprisonment up to nine months and with a fine up to 2000 marks or with one of these penalties.

Section 21. The action to desist or for compensation for injury specified in this law is outlawed within six months from the time in which the person entitled to the action acquires knowledge of the act and of the person liable, and, without regard to this knowledge, within three years from the committing of the act.

For the claims to compensation for injury the period of prescription does not begin before the time in which an injury arose.

Section 22. Criminal prosecution takes place, with the exception of the cases specified in sections 6, 10 and 11, only upon complaint. In

the cases of sections 4, 8 and 12 every manufacturer and association specified in section 13, paragraph 1, has the right to make the complaint.

The withdrawal of the complaint is permissible.

Punishable acts, whose prosecution occurs only upon complaint, can be prosecuted by way of private suit by those qualified to make the complaint, without requiring a previous complaint to the State prosecuting officers. Public complaint is made by the State prosecuting officers only if this is in the public interest.

If prosecution occurs by way of private suit, then the "Schoffen" courts[1] have jurisdiction.

Section 23. If in the cases of sections 4, 6, 8 and 12, a penalty is adjudged, then it may be ordered that the condemnation be made publicly known at the cost of the culprit.

If in the cases of section 15 a penalty is adjudged, then the injured party is allowed the right to have the condemnation made publicly known within a definite time at the cost of the condemned person.

Upon request of the accused who has been acquitted, the Court may order the public announcement of the acquittal; the State treasury bears the cost in so far as the same is not imposed on the accuser or the private complainant.

If upon the basis of one of the provisions of this law an action to desist is brought, then the successful party may be granted in the judgment the right to have the decree part of the judgment made publicly known within a definite period at the cost of the defeated party.

The manner of the announcement is to be determined in the judgment.

Section 24. For complaints upon the basis of this law the court in whose district the defendant has his business establishment, or in absence of that, his domicile, has exclusive jurisdiction. For persons who have neither a business establishment nor domicile within the country, the court of the place of sojourn within the country, or when such is not known, the court in the district in which the act occurred, has exclusive jurisdiction.

Section 25. For enforcing the actions to desist specified in this law, temporary orders may be made, even if the prerequisites specified in sections 935 and 940 of the Code of Civil Procedure do not apply. The District Court also has jurisdiction within whose district the dealings occurred upon which the action is based; besides the provisions of section 942 of the Code of Civil Procedure apply.

Section 26. Besides a penalty inflicted in accordance with this law, upon demand of the injured party, a money fine, to be paid to him, may be adjudged up to the amount of ten thousand marks. For this fine those condemned thereto are responsible as joint debtors. An adjudged fine excludes the right to make further claims for compensation for damages.

Section 27. Civil suits, in which, by complaint, an action is brought on the basis of this law, in so far as the State courts have original jurisdiction, belong before the chambers for business cases.

In civil suits, in which, by complaint or counter complaint, an action is brought on the basis of this law, the proceedings and decision

[1] Courts of inferior jurisdiction having one professional and two lay judges or assessors.

in the last instance, according to section 8 of the introductory law to the law for the organization of the courts, are referred to the Imperial Court.

Section 28. Whoever does not possess a principal place of business within the country has a claim to the protection of this law only in so far as, in the State in which his principal place of business is found, German manufacturers enjoy a corresponding protection, according to an announcement contained in the Imperial Gazette.

Section 29. What authorities in each federal State are to be understood under the designation of superior administrative authorities in the meaning of this law is determined by the central authorities of the federal States.

Section 30. This law takes effect October 1, 1909.

At that time the Law for Preventing Unfair Competition of May 27, 1896 (Imperial Gazette, p. 145), ceases to have force.

Authenticated under our own august signature and affixed imperial seal.

Issued at New Palace, June 7, 1909.

[SEAL.] WILLIAM.

VON BETHMANN HOLLWEG.

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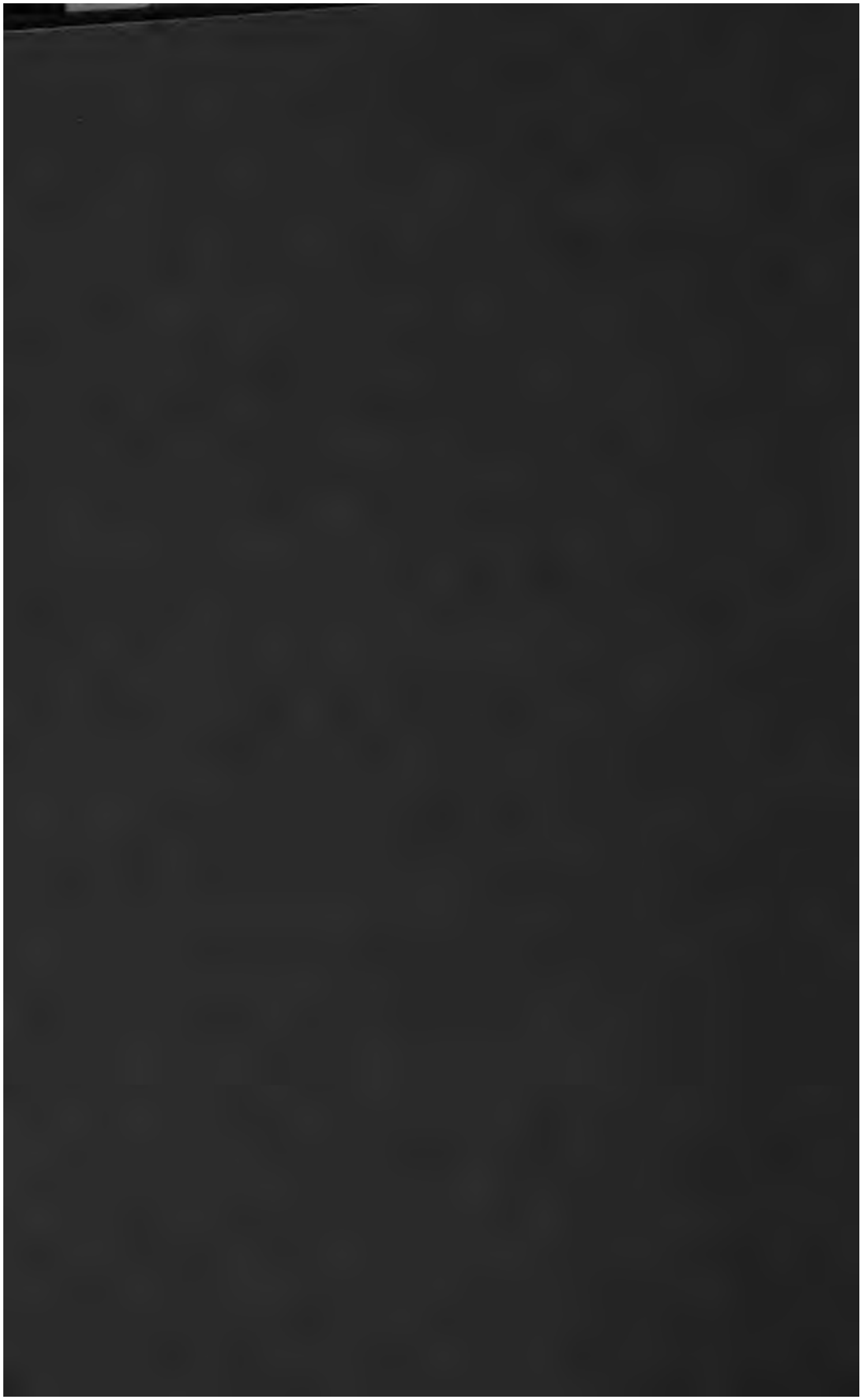
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